

FUSION VOTING AND THE NEW JERSEY CONSTITUTION: A REACTION TO NEW JERSEY'S PARTISAN POLITICAL CULTURE

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Only by breaking the hold of the Democratic and Republican mandarins on the governor's office and putting a rein on their power will the state have any hope for the kind of change needed to halt its downward economic, political and ethical spiral. New Jersey needs radical change in Trenton. Neither of the major parties is likely to provide it. [An independent candidate's] election would send shock waves through New Jersey's ossified political system and, we believe, provide a start in a new direction. It would signal the entrenched leadership of both parties and the interest groups they regularly represent that an ill-served and angry electorate demands something better.¹

I. INTRODUCTION

In 2009, New Jersey's largest newspaper endorsed an independent candidate for governor—not as an emphatic statement of support for his policies, or as a rejection of the proposals (or lack thereof) of the Democratic and Republican candidates, but rather as a strong denunciation of the two major parties themselves and the politics they represent in New Jersey.² The editorial identified a disillusioned electorate unsatisfied with the present state of affairs—a political system stuck in an ineffective status quo at the hands of the two major parties.³ In a state where unaffiliated voters represent the

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¹ Editorial, *Star-Ledger Endorses Independent Chris Daggett for N.J. Governor*, STAR-LEDGER, Oct. 11, 2009, at 22.

² See *id.* ("The newspaper's decision is less a rejection of [the Democratic Governor and the Republican candidate] than a repudiation of the parties they represent, both of which have forfeited any claim to the trust and confidence of the people of New Jersey. They share responsibility for the state's current plight.").

³ *Id.*

strongest voting bloc, outnumbering both Democrats and Republicans,⁴ the editorial claimed it was time for the voters to vote for an independent and send a strong message through the ballot to the two major parties—that politics as usual must not continue.⁵ New Jersey's 2009 gubernatorial election was an impetus for change—a significant opportunity for voters to reject the previous failures of the two major parties and demand a new course of action in the state.⁶ The 2009 gubernatorial election demonstrates that New Jersey voters thirst for political alternatives.⁷

The problem facing independent and third party candidates is that voters believe a vote for independents and third parties is a waste of a vote.⁸ These voters are wary of casting a ballot for a candidate who, most likely, has little chance of winning the election and whose contribution to the election may be the role of spoiler—tipping the

⁴ See N.J. DEP'T OF STATE—DIV. OF ELECTIONS, STATEWIDE VOTER REGISTRATION SUMMARY (Nov. 2, 2009), available at <http://www.state.nj.us/state/elections/election-results/voter-summary-by-county-110209.pdf>.

⁵ See Editorial, *supra* note 1, at 22.

⁶ See *id.* Leading up to election day, Independent candidate, Chris Daggett polled as high as 20% and his popularity was largely viewed as a rebuke by the voters of the two major parties and their candidates. See RUTGERS-EAGLETON INST. OF POLITICS, CORZINE MAY BE OPENING UP SOME SPACE DAGGETT GAINING THOUGH STILL WELL BEHIND 1-2 (2009), available at http://eagletonpoll.rutgers.edu/polls/release_10-22-09.pdf.

⁷ See David M. Halbfinger, *Independent Candidate Stirs up the Governor's Race in New Jersey*, N.Y. TIMES, Oct. 11, 2009, at A17; Max Pizarro, *The Daggett Factor Dominates Operatives Attention*, POLITICKERNJ.COM (Oct. 21, 2009, 3:16 PM), <http://www.politickernj.com/max/34348/daggett-factor-dominates-operatives-attention>.

Polling before the election showed a strong voter dissatisfaction with the current state of New Jersey politics, particularly with what voters viewed as the ineffective and tone-deaf political parties. Only about one third of voters who supported either the Democrat or Republican candidate “strongly” did so; 30% of those who said they would support either the Democrat or Republican stated they will because they “dislike the other candidates.” See N.Y. TIMES, OCTOBER 15, 2009 POLL OF NEW JERSEY, at 4 question 15 (2009), available at <http://documents.nytimes.com/the-new-york-times-new-jersey-poll#p=4>.

⁸ See Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 224 (2007); see also Elissa Berger, Note, *A Party that Won't Spoil: Minor Parties, State Constitutions and Fusion Voting*, 70 BROOK. L. REV. 1381, 1383–84 (2005).

Daggett's final vote of 5.7% was less than the final margin of victory but significantly lower than what he had been polling at in the weeks before the election. The large drop off from polling support to votes at the ballot demonstrates that while New Jersey voters crave an alternative, when push comes to shove they will only vote for someone they perceive as capable of winning. See Josh Margolin & Claire Heining, *It's Christie Hungry for Change, Voters Ditch Corzine*, STAR-LEDGER, Nov. 4, 2009, at 1.

result of the election from one major party candidate to the other.⁹ Voters who may consider voting for alternative candidates are generally dissatisfied with the politics or policies of the two major parties and wish to send a message through the ballot.¹⁰ As a result, the current two-party system diminishes the message of minor parties, and they are unable to sustain themselves.¹¹ Thus the opinions and concerns of voters clamoring for a change from the two major parties largely go unheard and unanswered.

Fusion voting, otherwise known as cross-nomination or multiple-party nomination, is a mechanism that will allow New Jersey voters to send direct and powerful messages to candidates and public officials and demand action on important public policy issues. Fusion voting, which was a common and effective practice at the end of the nineteenth century and into the early-twentieth century,¹² allows a candidate to receive the nominations of more than one political party, usually a major party and a minor party, and to appear on the ballot on each party line.¹³ The total votes of each party is calculated and a candidate cross-nominated by multiple parties has all the votes from each party line combined to determine his final vote total.¹⁴ At the general election, voters thus have the opportunity to express their political messages by voting for a minor party that represents their views, while simultaneously influencing the outcome of the election by voting for a major party candidate who has a chance of winning.

Presently, New Jersey, as well as forty-two other states and the District of Columbia, prohibits fusion voting.¹⁵ Proponents of fusion argue that anti-fusion laws burden parties' and voters' rights of free association and expression.¹⁶ In 1997, the U.S. Supreme Court upheld Minnesota's anti-fusion statute against a constitutional challenge that the ban violated a party's right to freely associate pursuant

⁹ See Berger, *supra* note 8, at 1381–83.

¹⁰ See *id.* at 1383.

¹¹ See *id.*

¹² See generally Peter H. Argersinger, "A Place on the Ballot": *Fusion Politics and Anti-fusion Laws*, 85 AM. HIST. REV. 287 (1980); see also discussion *infra* Part II.B.

¹³ See Argersinger, *supra* note 12, at 288.

¹⁴ William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683, 687 (1995).

¹⁵ ADAM MORSE & J.J. GASS, BRENNAN CTR. FOR JUSTICE, MORE CHOICES, MORE VOICES: A PRIMER ON FUSION 1, 3 (2006), available at http://www.brennancenter.org/page/-/d/download_file_39345.pdf.

¹⁶ See Brief for Respondent at *30–34, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (No. 95-1608), 1996 WL 501955.

to the First Amendment.¹⁷ Therefore, a successful challenge to anti-fusion laws must raise state constitutional arguments alleging a violation of either the expressive and associational rights of political parties, candidates and voters, or the right to vote.¹⁸

This Comment analyzes the constitutionality of New Jersey's ban on fusion voting.¹⁹ Given New Jersey's broad constitutional protections of associational and expressive rights,²⁰ this Comment concludes that New Jersey's anti-fusion law is unconstitutional. The law violates the associational rights of candidates and minor parties and the expressive rights of voters and minor parties enshrined in Article I, paragraphs 6 and 18 of the New Jersey Constitution.²¹ The fusion ban, however, does not unconstitutionally infringe upon a voter's right to vote.

Part II of the Comment will discuss the history of fusion in the United States and New Jersey, as well as the current state of fusion voting after the United States Supreme Court's decision in *Timmons v. Twin Cities New Area Party*. Part III will discuss why the New Jersey Supreme Court must conduct an independent analysis on state constitutional grounds, as opposed to relying on the federal precedent that *Timmons* established. Part IV will use a balancing test to determine whether New Jersey's legitimate interests in banning fusion outweigh the associational and expressive rights of political parties,

¹⁷ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); see also discussion *infra* Part II.D.

¹⁸ See generally Berger, *supra* note 8 (arguing that anti-fusion laws are susceptible to state constitutional challenges despite the U.S. Supreme Court's ruling in *Timmons*). The Supreme Court did not consider fusion voting as a constitutionally protected exercise of parties' and voters' expressive rights given its jurisprudence declaring no First Amendment right for a voter to express a message through the act of voting. See *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 334–38 (1993).

¹⁹ New Jersey does not explicitly ban fusion in a single statutory provision. This Comment treats the collection of election laws that effectively prohibit the practice of fusion voting as one general ban. See New Jersey anti-fusion statutes cited *infra* note 80 and the accompanying text. Although this Comment analyzes New Jersey's anti-fusion law pursuant to its state constitution, many other states have similarly worded provisions in their own state constitutions.

²⁰ See discussion *infra* Part III.B.1–2.

²¹ N.J. CONST. art. I, para. 6 protecting freedom of speech and the press, states, in part, “[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.” N.J. CONST. art. I, para. 18, protecting the right of assembly and to petition for redress of grievances, states, “[t]he people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.”

voters and candidates,²² or the electorate's right to vote.²³ Part V proposes a model statute that the New Jersey Legislature should enact, when the fusion ban is found unconstitutional, that protects the rights of political parties and voters while reasonably regulating the practice in New Jersey.

II. FUSION VOTING: AN OVERVIEW

A. *What is Fusion Voting—Policies and Benefits*

Fusion is the process by which a candidate for office receives the nomination of more than one party and appears on the ballot on multiple party lines.²⁴ A voter has a choice of selecting on which line to vote for the candidate. The number of votes that a candidate receives, across all party lines, are added together to determine the candidate's final vote total.²⁵

Calculating the total number of votes that a candidate receives on a given party line is imperative to fusion voting because it demonstrates the amount of support a candidate has from that party.²⁶ A successful third party that provides strong support for a major party candidate on its party ballot line will have a grateful elected official who is amenable to the ideas of the minor party, providing third par-

²² See *id.* art. I, para. 6 (free speech provision); *id.* art. I, para. 18 (free assembly provision).

²³ See *id.* art. II, sec. I, para. 3 ("Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people.").

²⁴ See Argersinger, *supra* note 12, at 288.

²⁵ See Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 HARV. L. REV. 1302, 1305 n.17 (1996) [hereinafter *Fusion Candidacies*].

²⁶ This is best evidenced by elections result in New York, which has had the most active fusion voting system this century. See generally Brief of the Conservative Party of New York and Liberal Party of New York as Amici Curiae supporting Respondent at *6–15, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (No. 95-1608), 1996 WL 501925. Presidents Franklin Delano Roosevelt, John F. Kennedy, and Ronald Regan carried the state of New York, in at least a small part, because of the fusion tickets in which they participated. See Kirschner, *supra* note 14, at 683. New York City Mayors Fiorello LaGuardia and Rudy Giuliani had similar experiences with fusion tickets. See *id.* Mayor Giuliani won the 1993 mayoral election running on a fusion ballot of the Republican and Liberal Parties. His victory margin was less than the number of votes from the Liberal Party line on the ballot. *Id.* Another notable beneficiary of fusion voting was California Governor Earl Warren who benefited from fusion in three gubernatorial elections. *Id.* (citing Robert J. Pritchell, *The Electoral System and Voting Behavior: The Case of California's Cross-Filing*, 12 W. POL. Q. 459, 474 (1959)).

ty members with representation that they previously did not have²⁷ and thereby opening up avenues of influence for the minor parties to shape public policy.²⁸ Minor parties wield even more influence with elected candidates when their ballot line provides a level of voter support higher than the margin of victory in the election—essentially signaling to the official that he would have lost the election if not for the minor party's votes.²⁹ Counting the votes on each party line separately demonstrates the importance of party nominations on a ballot as a means of engaging in political speech.³⁰

Without fusion, minor parties are in the difficult position of either nominating a candidate who will struggle to gain support, likely lose and who can serve as a spoiler, or not nominating a candidate at all and endorsing a major party candidate.³¹ Neither option supports the long-term success, stability, and political influence of a minor party.³² Voters want to vote for a candidate who at least has a legitimate chance of winning, but minor parties cannot cater to that desire.³³

A fusion system gives a minor party the opportunity to influence the outcome of elections by nominating a major party candidate. Cross-nominations allow a party to endorse a candidate with a chance

²⁷ See *Fusion Candidacies*, *supra* note 25, at 1309–10.

²⁸ See Berger, *supra* note 8, at 1384 n.17. Demonstrating that a party (and its platform) has electoral support through a strong vote total on the party line can lead the winning candidate to recognize and endorse the party's policies. New York State's experience shows that success at the polls with fusion tickets can lead to influence over politicians in office. See *id.* at 1392 (discussing the success of the Conservative Party in influencing Republican officials on morality issues and the Working Families Party in achieving a living-wage provision).

²⁹ See *Patriot Party v. Alleghany Cnty. Dep't of Elections*, 95 F.3d 253, 261 (3d Cir. 1996). Though this is an oversimplification of the issue since some of the minor party voters would probably vote for the major party candidate, while some voters would just stay home. Yet the strong signal to the candidate is delivered anyway.

³⁰ See *Fusion Candidacies*, *supra* note 25, at 1305 n.18.

³¹ See Kirschner, *supra* note 14, at 700; Berger, *supra* note 8, at 1383.

³² See *McKenna v. Twin Cities Area New Party*, 73 F.3d 196, 199 (8th Cir. 1996) (nominating winning candidates is vital to the success of a political party). “The risk of ‘spoiling’ or ‘wasting votes,’ however, makes it hard for minor parties and independent candidates to consistently secure voters’ support at the ballot box, even if voters remain committed to the party and candidate’s ideology.” Berger, *supra* note 8, at 1383 (explaining that a minor party rarely runs their own candidate in more than two election cycles (citing STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA* 81, 174–75 (2d ed. 1996)). But see James Gray Pope, *Fusion*, *Timmons v. Twin Cities Area New Party*, and the *Future of Third Parties in the United States*, 50 *RUTGERS L. REV.* 473, 500–01 (1998) (arguing that minor parties may “lose their identity and sense of purpose when they fuse with major parties” and minor parties may have more power and influence in election systems that ban fusion than they would have if the Supreme Court in *Timmons* ruled that fusion bans were unconstitutional).

³³ See Kirschner, *supra* note 14, at 700.

of winning the election, while simultaneously giving voters the opportunity to demonstrate support for the party's beliefs and policies without having to worry about a "wasted vote" or "spoiling" the election.³⁴ Furthermore, minor parties presently rely heavily on an individual candidate's appeal and not necessarily on the party's ideology and beliefs.³⁵ Fusion voting removes the candidate-centric nature of minor parties and pushes the focus onto a party's platform.

Fusion voting presents the opportunity for minor parties to effectively and consistently play a substantial role in the electoral process.³⁶ A minor party can develop into a force in the political and electoral process by helping cross-nominated candidates win elections.³⁷ By cross-nominating, minor parties have the ability to establish coalitions with major parties to craft a strategy to effectively express their political message and build support for their policies. These coalitions can expand political opportunity for voters who are dissatisfied with the two major parties.³⁸ Fusion voting allows voters and parties to express their true political choices and discontent with the two-party system.³⁹ A fusion system would likely increase voter participation because more voters' beliefs would be represented by a candidate with a chance of winning.⁴⁰

The benefits of fusion voting are not theoretical. Fusion systems were prevalent during the Progressive Era and the effects and results

³⁴ Berger, *supra* note 8, at 1384 (noting that "fusion voting makes one vote count twice—first it sends a message about the issues the voter cares about and then it helps elect a candidate").

³⁵ See Kirschner, *supra* note 14, at 703 (citing STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE* 80–81 (1984)). This leads to a situation where the most successful third party candidates, who can break through and appeal to the public, are either very wealthy or celebrities. See Berger, *supra* note 8, at 1386.

³⁶ See Kirschner, *supra* note 14, at 683–84.

³⁷ See Julie Bosman & Kareem Fahim, *Young and Active, the Working Families Party Shows Muscle in the Primaries*, N.Y. TIMES, Sept. 16, 2009, at A28 (reporting that in New York State, the nascent Working Families Party has garnered success in a short period of time through its effective use of cross-nomination and providing strong voter support for its fusion candidates).

³⁸ See *Fusion Candidacies*, *supra* note 25, at 1304. A fusion system will ensure that more views and voters are represented by the winning party in governing and will create stronger and diverse opposition. Fusion gives the major party that is currently out of power the ability to form political alliances and thus more effectively challenge the major party in power. See Kirschner, *supra* note 14, at 712 (citing *Swamp v. Kennedy*, 950 F.2d 383, 388 (7th Cir. 1991) (Ripple, J., dissenting from denial of rehearing en banc)).

³⁹ Kirschner, *supra* note 14, at 701, 720.

⁴⁰ See *id.* at 720; Argersinger, *supra* note 12, at 289.

of this mechanism can be seen from its actual electoral use during the late-nineteenth century.

B. History of Fusion Voting

Fusion voting was an active and popular mechanism of Progressive Era politics.⁴¹ Third parties thrived during this time because “[fusion] helped maintain a significant third party tradition by guaranteeing that dissenters’ votes could be more than symbolic protest, that their leaders could gain office, and that their demands might be heard.”⁴² Less than 5% of a statewide vote was often sufficient for a minor party to be the tipping point in the balance of power in narrowly decided elections.⁴³ The out-of-power major party and a minor party used fusion successfully to form an alliance united against the dominant party controlling the government.⁴⁴ This success ultimately led to fusion’s downfall because the major party controlling the legislature sought to decrease the power of the opposition—giving rise to the prohibition of fusion voting.⁴⁵

States began to prohibit fusion systems in the late-1800s and early-1900s.⁴⁶ The new bans on cross-nominations intended to limit and restrict the ability and freedom of minor political parties to thrive, as well as decrease the power of the major party in the opposition.⁴⁷ Under the “mild cover of procedural reform” and good government, the Republican Party in state legislatures across the country enacted electoral reforms that were a “conscious effort to shape the political arena by disrupting opposition parties, revising traditional campaign

⁴¹ See Argersinger, *supra* note 12, at 288. In the late-nineteenth century, fusion voting was such a fixture of the political system of the time that there was either a full or partial fusion ticket on the ballot in almost every election in the Midwest and West. *Id.* Fusion voting during this time was largely a local and state issue, not practiced during national elections. See *id.* at 296.

⁴² *Id.* at 288–89.

⁴³ See *id.* at 296–99.

⁴⁴ *Id.* at 288. In Midwestern and Western states, fusion tickets brought together the out-of-power Democratic Party and the minor Populist Party in an alliance against the Republican Party, which generally controlled these state legislatures. *Id.*

⁴⁵ See *id.* at 290–94.

⁴⁶ Kirschner, *supra* note 14, at 687. In the ten years between 1897 and 1907, thirteen state legislatures passed anti-fusion laws. *Id.* at 688.

⁴⁷ *Id.* Anti-fusion laws were “enacted by politicians who deliberately sought to protect or advance their own interests by manipulating the rules of the game.” Argersinger, *supra* note 12, at 306.

and voting practices, and ensuring Republican hegemony” by banning the practice of fusion voting.⁴⁸

The advent of the Australian ballot system⁴⁹ and one uniform ballot increased the ability of the major party in power to restrict the power and support of other parties—the ballot itself was used as a tool to ban fusion.⁵⁰ The simplest ballot rule to restrict fusion was instituting a limit that a candidate’s name could appear only once on a ballot.⁵¹ Before states had one official state ballot, each party had its own physical ballot it distributed to voters and a voter could vote for a cross-nominated candidate on his own party’s ballot.⁵²

The limit of a candidate appearing only once on the ballot would force some party members in a fusion alliance to vote for a candidate under a different party’s banner, which many voters were loath to do.⁵³ The practice of an official ballot listing a candidate’s name “but once”⁵⁴ on the ballot was described as a “scheme to put the voters in a straight jacket”⁵⁵ and “its only purpose [was] to pre-

⁴⁸ Argersinger, *supra* note 12, at 288. “Ending the effective cooperation of Democrats and third party groups was both the primary goal and the major result of these efforts.” *Id.* at 303.

⁴⁹ Under the Australian ballot system, “an official ballot, containing the names of all the candidates legally nominated by all the parties, was printed at public expense and distributed by public officials at polling places.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 356 (1997). Prior to the adoption of the system in the late-1800’s, the parties distributed ballots to voters or voters produced their own ballots. *Burdick v. Takushi*, 504 U.S. 428, 446 (1992) (Kennedy, J., dissenting). The Australian ballot system reduced corruption and created privacy for voters. See Berger, *supra* note 8, at 1388. For a detailed history of the adoption of the Australian ballot system, see generally John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 486–91 (2003).

⁵⁰ Argersinger, *supra* note 12, at 291–92.

⁵¹ *Id.* at 291. In fact, the law mandating that a candidate’s name could only appear but once on the ballot, was such a subtle attack on fusion, Oregon Democrats did not realize its implications until a year after the law passed and the party tried to cross-nominate with the Populist Party. *Id.* at 293.

⁵² *Id.* at 291–92.

⁵³ *Id.* In Oregon and Minnesota, in the elections immediately following the ban, when Democrat and Populist parties tried to fuse to beat the Republican candidate but were unable to do so, the combined vote for the individual Democrat and Populist would have defeated the Republican candidate by a significant margin; however, the Republican won the election as the popular vote winner. *Id.* at 293–95.

⁵⁴ New Jersey adopted the language in 1922, which remains in effect today. 1922 N.J. Sess. Law, c. 242, sec. 32, at p. 446–47; N.J. STAT. ANN. § 19:14-2 (West 2010).

⁵⁵ Argersinger, *supra* note 12, at 292 (quoting State *ex rel.* Christy v. Stein, 53 N.W. 999, 1003 (Neb. 1892)).

vent fusion' . . . [and] to interfere with 'the freedom of action of the party . . . [and] of the citizens who compose that party.'"⁵⁶

The history of anti-fusion laws demonstrates the dominant political party's intent to exercise its political will and shape electoral statutes for the sole purpose of preventing opposing parties from coalescing and threatening its control on government.⁵⁷ The decline in fusion voting was not an "unintended consequence' of ballot change but rather resulted from 'sharp practice.' The institutional change had been purposely designed to exploit the observed behavioral patterns in the political culture and did not represent some abstract or disinterested impulse towards 'reform.'"⁵⁸ Despite the less-than-pure intent of the prohibition, legal challenges to the anti-fusion statutes were overwhelmingly unsuccessful.⁵⁹ Litigation as a means to revive fusion, however, gained support in the 1990s with mixed success⁶⁰ until the issue ultimately reached the United States Supreme Court for adjudication.⁶¹

C. Political Parties and Fusion Voting in New Jersey

1. "Political Party" Is Statutorily Defined in New Jersey

The term, "political party," has a specific statutory definition in New Jersey with only two parties achieving the designation. In New

⁵⁶ *Id.* (quoting *State ex rel. Runge v. Anderson*, 76 N.W. 482, 487 (Wisc. 1898) (Winslow, J., dissenting)). Justice Winslow continued on to note that the single listing of a candidate's name would not prevent illegal votes, end corruption, or "preserve the purity of the ballot," for which the State argued the anti-fusion legislation was necessary. *Runge*, 76 N.W. at 487.

⁵⁷ See Kirschner, *supra* note 14, at 712 (citing Arsgersinger, *supra* note 12, at 290–92).

⁵⁸ Arsgersinger, *supra* note 12, at 295.

⁵⁹ Kirschner, *supra* note 14, at 689. See, e.g., *Socialist Party v. Uhl*, 103 P. 181, 188 (Cal. 1909); *Hennegan v. Gearner*, 47 A.2d 393, 396 (Md. 1946); *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 958 (Mo. 1914); *State ex rel. Curyea v. Wells*, 138 N.W. 165, 167 (Neb. 1912); *State ex rel. Thatcher v. Brodigan*, 142 P. 520, 522–23 (Nev. 1914); *Appeal of Magazzu*, 49 A.2d 411, 412 (Pa. 1946); *State ex rel. Runge v. Anderson*, 76 N.W. 482, 486 (Wis. 1898). But see *State ex rel. Murphy v. Curry*, 70 P. 461, 461 (Cal. 1902); *In re City Clerk of Paterson*, 88 A. 694, 695 (N.J. Sup. Ct. 1913); *In re Hopper v. Britt*, 96 N.E. 371, 375 (N.Y. 1911).

⁶⁰ See, e.g., *Stewart v. Taylor* 104 F.3d 965 (7th Cir. 1997) (upholding anti-fusion law); *Twin Cities Area New Party v. McKenna*, 73 F.3d 196 (8th Cir. 1996) (striking down anti-fusion laws); *Patriot Party v. Alleghany Cnty. Dep't of Elections*, 95 F.3d 253 (3d Cir. 1996) (declaring anti-fusion law unconstitutional on equal protection, as well as First Amendment, grounds); *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991) (upholding anti-fusion law).

⁶¹ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 356–57 (1997); see discussion *infra* Part II.D.

Jersey, a “political party” is “a party which, at the election held for all of the members of the General Assembly next preceding the holding of any primary election held pursuant to [Title 19], polled for members of the General Assembly at least 10% of the total vote cast in this State.”⁶² This Comment will refer to the statutory political parties as “major parties,” which includes the Democratic and Republican parties.

The benefits of achieving major party status include the ability to hold a primary⁶³ and gaining access to one of the top spots on the ballot.⁶⁴ At one point, the benefits for major parties also included a statutory restriction that permitted voters to register as members of major parties only and not minor parties, as well as free access for the major parties to voter information, while the minor parties had to pay for the same information.⁶⁵

2. New Jersey’s History of Fusion Voting

In the late-nineteenth and early-twentieth centuries, the state of New Jersey implicitly, and then explicitly, allowed parties to cross-nominate candidates. Prior to 1911, New Jersey implicitly permitted fusion because the election code did not expressly prohibit or allow the practice.⁶⁶

In 1911, the New Jersey Legislature passed an election reform bill, the Geran Law,⁶⁷ which Governor Woodrow Wilson hailed as a

⁶² N.J. STAT. ANN. § 19:1-1 (West 2010).

⁶³ *See id.* § 19:5-1.

⁶⁴ *See id.* § 19:14-12.

⁶⁵ The New Jersey Appellate Division declared these two benefits invalid in 2001. *Council of Alt. Political Parties v. State*, 781 A.2d 1041, 1052–53 (N.J. Super. Ct. App. Div. 2001).

⁶⁶ *See* JOHN F. REYNOLDS, *TESTING DEMOCRACY: ELECTORAL BEHAVIOR AND PROGRESSIVE REFORM IN NEW JERSEY, 1880–1920*, 44, 93, 170 (1988) (discussing examples of fusion tickets during various points of New Jersey history). The lack of a statutory provision on the issue, though, had nothing to do with the process of fusion voting; rather, before 1911, New Jersey did not heavily regulate ballot procedures. New Jersey was one of the last states to enact the Australian ballot system imposing a standard ballot, which required further State regulation. Arthur Ludington, *Ballot Legislation of 1911*, 6 AM. POL. SCI. REV. 54, 54 (1912); Arthur Ludington, *Election Laws: The New Geran Law in New Jersey*, 5 AM. POL. SCI. REV. 579, 579–80, 584 (1911) (declaring New Jersey’s prior electoral scheme as “one of the most backward and unsatisfactory in the country”).

⁶⁷ For a background of the Geran Law and its legislative history, see generally, Ralph Simpson Boots, A.M., *The Direct Primary in New Jersey*, 30–38 (May 18, 1917) (unpublished Ph.D. dissertation, Columbia University), available at <http://books.google.com/books?id=IWIDAAAAIAAJ&dq=The%20Direct%20Primary%20in%20New%20Jersey&pg=PA30#v=onepage&q&f=false>.

“thoroughgoing reform of the whole electoral process of the State.”⁶⁸ Governor Wilson and the Legislature viewed fusion as such an integral means of “put[ting] every process of choice directly in the hands of the people,”⁶⁹ that it was expressly provided for in the sweeping reform bill.⁷⁰ This broad reform enacted a standardized statewide ballot presenting the slates of each party, and provided an affirmative mechanism to allow for multiple nominations that empowered the voting public to express their beliefs via their choice of candidate and party.⁷¹ The Geran Law provides an early indication that the Legislature viewed the ballot as more than just a means of casting a vote, but rather as an expressive tool between candidate, party and voter. When New Jersey first implemented a single official State ballot, the Legislature clearly permitted the ballot itself to be used for political expression.

New Jersey’s experiment with fusion voting was short-lived.⁷² In the early-1920s, the New Jersey Legislature began to impede the growth of minor parties to preserve the strength of the two major

⁶⁸ *Wilson Scores Again as Lawmakers Quit*, N.Y. TIMES, Apr. 22, 1911, at 3. The thrust of the bill was New Jersey very belatedly adopting the Australian ballot system and enacting a single official ballot, after the majority of states had already ended the practice of each party having a separate ballot. See 1911 N.J. Sess. Law, c. 183, sec. 53, at p. 313. See generally Ludington, *Ballot Legislation*, *supra* note 66. The law also contained numerous anti-corruption provisions. See generally 1911 N.J. Sess. Law, c. 183.

⁶⁹ See *Wilson Scores Again as Lawmakers Quit*, *supra* note 68.

⁷⁰ While the rest of the country, particularly Republican-led legislatures, was banning fusion in the early twentieth century, Governor Woodrow Wilson and the Democratic Legislature cut against the grain and enacted a pro-fusion provision as part of a comprehensive electoral system reform. The law was not a classic robust fusion voting system in the sense that each party nominated a candidate on its own line. Ludington, *Ballot Legislation*, *supra* note 66, at 54; Ludington, *The New Geran Law in New Jersey*, *supra* note 66, at 584. It was more of a “fusion-lite” system, similar to the one recently enacted by Oregon in 2009, which, in effect, allows multiple parties to nominate a candidate, but the candidate only appears on one line on the ballot with all the party nominations following his name. See Editorial, *For a More Democratic Oregon*, THE OREGONIAN, July 7, 2009.

⁷¹ Specifically, the law contained directions for a candidate who received more than one party’s nomination. 1911 N.J. Sess. Law, c. 183, sec. 54, at p. 313.

Any candidate receiving the nomination of more than one political party or group of petitioners may . . . file with the public official charged with the duty of printing the ballots a notice directing such official in what order the several nominations shall be added to his name upon the official ballot

Id. Ludington, *Ballot Legislation*, *supra* note 66, at 54; see also *In re City Clerk of Paterson*, 88 A. 694, 695–96 (N.J. Sup. Ct. 1913) (ordering the city clerk to place a candidate on the ballot as the nominee of both the Republican and Progressive parties because the law did not forbid it).

⁷² Fusion voting in New Jersey was not popular with certain officials in the major parties. See *Republican Opposes Fusion in Jersey*, N.Y. TIMES, July 18, 1913, at 16.

parties.⁷³ In 1921, the Legislature passed two provisions to prohibit fusion tickets—the first provision prevented a candidate who had accepted a primary nomination from engaging in a petition nomination;⁷⁴ the second prevented any candidate from accepting a petition nomination if that candidate had already accepted either a primary or petition nomination.⁷⁵ The following year, the New Jersey Legislature passed a law containing a provision prohibiting one party from nominating, as a candidate for office, the nominee of another party.⁷⁶ The language explicitly prevented any candidate from receiving multiple nominations, resulting in the demise of fusion voting in New Jersey.⁷⁷

3. The Current Status of Fusion Voting in New Jersey

Currently, no party in New Jersey is allowed to nominate a candidate for office if that candidate has already accepted another party's nomination.⁷⁸ New Jersey expressly prohibits multiple nominations through the regulation of the election ballot, stating that

⁷³ For example, in 1920, ballot access for third parties became stricter. The Legislature passed a law mandating that a party receive 10% of the statewide vote for the General Assembly, in order to become a recognized political party pursuant to the election laws. 1920 N.J. Sess. Law, c. 349, art. I, sec. 1(i), at p. 616. Previously, in order to achieve political party status, a party only needed 5% of the vote during the prior General Assembly election, but instead of a statewide total, the law only required the 5% in the specific “territorial district or division.” 1903 N.J. Sess. Law., c.248, sec. 3, at p. 606. The high standard for a third party to achieve official political party status is still the law today in New Jersey. *See* N.J. STAT. ANN. § 19:1-1 (West 2010).

⁷⁴ 1921 N.J. Sess. Law, c. 196, sec. 59, at p. 551 (“[A]ny such petition shall not undertake to nominate any candidate who has accepted the nomination for the primary for such position.”). The provision infringed upon fusion because once a major party's candidate accepted a primary nomination, that candidate could not participate in a minor party's petition nomination process. This provision was the precursor to the current N.J. STAT. ANN. § 19:13-4.

⁷⁵ 1921 N.J. Sess. Law, c. 196, sec. 60, at p. 551 (preventing a candidate from signing an acceptance of petition nomination “if he has signed an acceptance for the primary nomination or any other petition of nomination”). The provision prevented fusion tickets across two-minor parties through petition nominations. This provision was the precursor to the current N.J. STAT. ANN. § 19:13-8.

⁷⁶ Assemb. B. 50, 78th Leg. (N.J. 1922) (“An act to amend an act entitled ‘An act to regulate elections’”); *see also* JOURNAL OF THE SEVENTY-EIGHTH SENATE OF THE STATE OF NEW JERSEY 634, 717 (1922).

⁷⁷ The law amended the existing election provision to provide that “[t]he name of any candidate shall appear but once upon the ballot for the same office.” 1922 N.J. Sess. Law, c. 242, sec. 32, at p. 447.

⁷⁸ *Hand v. Larason*, 394 A.2d 163, 165 (N.J. Super. Ct. Law Div. 1978) (“[N]o person in New Jersey can legally accept the nomination of more than one party for the same office.”).

“[t]he name of a candidate shall appear but once upon the ballot for the same office.”⁷⁹ New Jersey reinforces this prohibition through additional statutes that regulate the nomination process and acceptance of nominations.⁸⁰ This Comment will treat all of these statutes as one general ban on fusion voting.

4. Why New Jersey Needs Fusion Voting

At the end of the nineteenth century, leading into the twentieth century, fusion voting was popular with voters as well as the political parties. Its popularity and success stemmed from the political culture of the time:

Voter turnout was at a historic high, rigid party allegiance was standard, and straight-ticket voting was the norm. Partisanship was intense, rooted not only in shared values but in hatreds engendered by cultural and sectional conflict. Changes in party control resulted less from voter conversion than from differential rates of partisan turnout or from the effect of third parties. . . . [E]lections were bitterly contested campaigns in which neither major party consistently attracted a majority of the voters.⁸¹

⁷⁹ N.J. STAT. ANN. § 19:14-2 (West 2010); *see supra* notes 54–56 and accompanying text (discussing the effect of “but once” language of a statute).

⁸⁰ N.J. STAT. ANN. § 19:13-1 (“Candidates for all public offices to be voted for at the general election in this state or in any political division thereof, except electors of president and vice president of the United States nominated by the political parties at state conventions, shall be nominated directly by petition as hereinafter provided, or at the primary for the general election held pursuant to this title.”); *id.* § 19:13-4 (“No such petition shall undertake to nominate any candidate who has accepted the nomination for the primary for such position.”); *id.* § 19:13-8 (“No candidate so named shall sign such acceptance if he has signed an acceptance for the primary nomination or any other petition of nomination under this chapter for such office.”); *id.* § 19:23-5 (“Candidates to be voted for at the primary election for the general election shall be nominated exclusively by the members of the same political party by petition in the manner herein provided.”); *id.* § 19:23-15 (“No candidate who has accepted the nomination by a direct petition of nomination for the general election shall sign an acceptance to a petition of nomination for such office for the primary election.”); *see also id.* § 19:14-9 (“indorsed by” provision).

The “indorsed by” provision provides that if somehow a person receives multiple nominations, then that candidate can only select one nomination but may have the words “indorsed by” and the other party’s name following the candidate’s name on the ballot. N.J. STAT. ANN. § 19:14-9. This situation is incredibly rare in New Jersey, given the ban on primary candidates from seeking other methods of nomination and the prohibition of a candidate from seeking multiple petition candidacies. The statute applies in the unique instance when a candidate wins a party’s nomination and subsequently wins the write-in vote of another party’s primary. *See, e.g.,* Hand v. Larson, 394 A.2d 163 (N.J. Super. Ct. Law Div. 1978).

⁸¹ Argersinger, *supra* note 12, at 289.

The political climate over one-hundred years ago is strikingly similar to the highly partisan nature of the electorate and political environment in New Jersey presently.

Fusion voting provided a refuge for those dissatisfied with the politics and policies of the two major parties. It allowed voters to express strong political views without having to either cast a protest vote for a candidate unlikely to win or cast a vote for one of two major party candidates, neither of whom were appealing options.⁸² Given this outlet for a significant portion of a discontented electorate, fusion voting was widely supported and practiced.⁸³ New Jersey's current political climate—with its bitterly fought elections, negative campaigns, and generally vitriolic political discourse—is ready for a reincarnation of fusion voting.

Most importantly, New Jersey voters do not hold deep ties to either of the two major parties.⁸⁴ At the ballot, voters choose between the two parties because of a lack of real choice, but the registration numbers show that almost half of New Jersey voters prefer to remain unaffiliated rather than declare themselves as an official member of the Democratic or Republican parties.⁸⁵

⁸² Fusion allowed these voters “to register their discontent effectively without directly supporting a party that represented negative reference groups and rarely offered acceptable policy alternatives.” *Id.* at 290.

⁸³ See discussion *supra* notes 41–44 and accompanying text.

⁸⁴ Almost 70% of New Jersey voters are open to a strong independent or minor party alternative to the two major parties and approximately 37% would prefer more parties than the two that currently dominate New Jersey politics. Matt Friedman, *Poll: Daggett Could Do Better with Voters Who Are Tired of the Major Parties*, POLITICKERNJ.COM (Oct. 26, 2009, 4:01 PM), <http://www.politickernj.com/matt-friedman/34509/poll-daggett-could-do-better-voters-who-are-tired-major-parties> (citing Rutgers-Eagleton poll of 583 likely voters between October 15–20, 2009 with a margin of error of plus or minus 4.1%).

Furthermore, the third party registration numbers support the theory that the electorate desires political alternatives. Between Election Day 2008 and Election Day 2009 minor party registration increased by 12.6%, while major party registration numbers remained largely unchanged. Michael McDonald, *Voter Registration Trends, May 2010*, POLLSTER.COM (May 11, 2010, 3:47 PM), http://www.pollster.com/blogs/voter_registration_trends_may.php.

⁸⁵ On Election Day 2009, approximately 45% of New Jersey voters were Unaffiliated, 34% were members of the Democratic Party and 20% were members of the Republican Party. N.J. DEP'T OF STATE—DIV. OF ELECTIONS, *supra* note 4; see also Tom Hester, Sr., *Registered Democrats Outnumber Republicans 1,766,669 to 1,061,899, But Dwarfed by N.J.'s Unaffiliated 2,393,679*, NEWJERSEYNEWSROOM.COM (Oct. 30, 2009), <http://www.newjerseynewsroom.com/state/registered-democrats-outnumber-republicans-1766669-to-1061899-but-dwarfed-by-njs-unaffiliated-2393679>.

D. Fusion Voting and the First Amendment: Timmons

In 1997, the United States Supreme Court, in *Timmons v. Twin Cities Area New Party*, held that state election laws that prohibit fusion voting do not violate a party's associational rights pursuant to the First Amendment.⁸⁶ The Court's decision resolved a circuit split between the Eighth Circuit, which found fusion voting constitutionally protected, and the Seventh Circuit, which declared that anti-fusion laws did not run afoul of the Constitution.⁸⁷

In 1994, Andy Dawkins, a Minnesota State Representative, ran unopposed in the Democratic-Farmer-Labor Party's ("DFL") primary for re-election to his seat.⁸⁸ In Minnesota, the DFL is one of two "major" parties, along with the Republican Party, according to Minnesota state election law.⁸⁹ The New Party,⁹⁰ a minor party in Minnesota, voted to nominate Dawkins and met all of the state's substantive ballot access requirements.⁹¹ Representative Dawkins accepted the nomination, to which the DFL did not object.⁹² Minnesota prohibits the practice of parties cross-nominating a candidate for the same office and election officials rejected the New Party's petition to nominate Representative Dawkins, thus preventing him from appearing on the

⁸⁶ 520 U.S. 351, 356 (1997).

⁸⁷ See Benjamin D. Black, Note, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 156–60 (1996). The Eighth Circuit ruled that Minnesota's anti-fusion law violated the associational rights of parties. *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 200 (8th Cir. 1996). The Seventh Circuit upheld both Wisconsin's and Indiana's bans on fusion voting. *Swamp v. Kennedy*, 950 F.2d 383, 387 (7th Cir. 1991) (upholding Wisconsin's ban on fusion); *Stewart v. Taylor*, 104 F.3d 965, 927 (7th Cir. 1997) (upholding Indiana's ban on fusion). The Third Circuit had declared a Pennsylvania fusion ban unconstitutional as a violation of First Amendment associational rights, as well as Fourteenth Amendment equal protection rights, because it allowed major parties to cross-nominate candidates in a limited number of elections, but not minor parties. *Patriot Party v. Alleghany Cnty. Dep't of Elections*, 95 F.3d 253, 270 (3d Cir. 1996), *aff'd on reh'g*, *Reform Party of Alleghany Cnty. v. Alleghany Cnty. Dep't of Elections*, 174 F.3d 305 (3d Cir. 1999) (affirming on equal protection grounds after *Timmons* found no First Amendment associational right to fusion).

⁸⁸ *Timmons*, 520 U.S. at 354; Brief for Respondent, *supra* note 16, at *1–2.

⁸⁹ See *Timmons*, 520 U.S. at 354 n.2.

⁹⁰ The New Party stated that its "broad aims are identical to those of more established parties: to promote candidates its members judge best represent their views, to use the electoral process to advance its program, and to widen its base of support in the general electorate." Brief for Respondent, *supra* note 16, at *1–2. The New Party's electoral strategy used a combination of running candidates that were exclusively New Party nominees and nominating consenting candidates of other parties. *Id.* at *2.

⁹¹ *Timmons*, 520 U.S. at 354; Brief for Respondent, *supra* note 16, at *2.

⁹² Brief of Respondent, *supra* note 16, at *2.

ballot under the New Party column.⁹³ The New Party filed suit, alleging that the anti-fusion statute violated the party's associational rights protected by the First Amendment.⁹⁴

The Supreme Court declared that anti-fusion statutes do not violate First Amendment associational rights.⁹⁵ The Court acknowledged that the anti-fusion law inhibited the New Party's associational rights but found that the burden on the party was "not severe."⁹⁶ When a party suffers a "lesser burden," the Court does not require proof that that regulation is "narrowly tailored and advance[s] a compelling state interest."⁹⁷ Instead, the Court applies a "less exacting review" under which Minnesota had to demonstrate "important regulatory interests" that are "sufficiently weighty" to justify "reasonable, nondiscriminatory restrictions."⁹⁸ The majority reasoned that the State had legitimate interests to avoid voter confusion, promote competition among candidates, prevent any distortions and manipulations of the electoral process or ballot, discourage party splintering and unrestrained factionalism, and preserve the stability of the two-party system.⁹⁹ These reasonable State interests were sufficient to justify the lesser burden on the New Party's associational rights.¹⁰⁰

In dissent, Justice Stevens found that the anti-fusion statute did impose a severe burden on the New Party and that the State did not provide sufficient justification for infringing upon the party's associational rights.¹⁰¹ Justice Stevens argued that political parties have a First Amendment right "to have their candidate's name appear on

⁹³ *Timmons*, 520 U.S. at 354–55; Brief for Respondent, *supra* note 16, at *2.

⁹⁴ The district court found in favor of Minnesota, upholding the statute. *Twin Cities Area New Party v. McKenna*, 863 F. Supp. 988, 994 (D. Minn. 1994). The Eighth Circuit reversed, concluding that the anti-fusion law posed a serious burden upon the New Party and that the state's law was overly broad and not narrowly tailored to achieve the State's interests. *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 200 (8th Cir. 1996).

⁹⁵ *Timmons*, 520 U.S. at 356.

⁹⁶ *Id.* at 362–64.

⁹⁷ *See id.* at 358–60.

⁹⁸ *Id.* at 358–59 (internal quotations omitted).

⁹⁹ *Id.* at 364.

¹⁰⁰ *See id.* at 369–70.

¹⁰¹ *Timmons*, 520 U.S. at 370–71 (Stevens, J., dissenting). Justice Stevens argued that the majority should not have considered preserving the two-party system as a state interest since the State did not raise this justification below. *Id.* at 377. Justice Souter also dissented, joining in part with Justice Stevens; however, Justice Souter would have accepted preserving the two-party system as a State interest provided that Minnesota had shown evidence that fusion voting would indeed harm and damage the two-party structure, which the State had not demonstrated. *Id.* at 382–84 (Souter, J., dissenting).

the ballot despite the fact that he was also the nominee of another party.”¹⁰²

E. The Present Landscape of Fusion Laws in States Post-Timmons

As a result of the *Timmons* decision, states are free to ban fusion voting without running afoul of First Amendment associational rights. The vast majority of states take this approach by—either directly or indirectly—prohibiting the cross-nomination of candidates.¹⁰³ These laws, however, may contravene provisions in their state constitutions.¹⁰⁴ State courts can be more critical of state justifications for burdening the associational rights of parties when analyzing violations pursuant to their own state constitutions than the *Timmons* Court was when it analyzed the violation of the New Party’s associational rights under the U.S. Constitution. Additionally, state courts can explore the expressive rights of parties and voters at the ballot, which the Supreme Court has refused to recognize in the First Amendment.¹⁰⁵

Recently, fusion has garnered increased interest as state legislatures have considered adopting fusion systems.¹⁰⁶ Even though there

¹⁰² *Id.* at 370 (Stevens, J., dissenting).

¹⁰³ See *Fusion Candidacies*, *supra* note 25, at 1303 n.14.

¹⁰⁴ Many states have broad constitutional provisions, particularly in the area of free speech and assembly, which would protect minor parties from the infringement that anti-fusion laws place upon their associational and expressive rights. See generally Berger, *supra* note 8 (arguing that anti-fusion laws are susceptible to state constitutional challenges despite the U.S. Supreme Court’s ruling in *Timmons*).

¹⁰⁵ In *Burdick* and *Timmons* the United States Supreme Court held that the First Amendment does not protect the ballot as a forum for political expression. *Burdick v. Takushi*, 504 U.S. 428, 438, 441–42 (1992); *Timmons*, 520 U.S. at 363. The Supreme Court, however, has since recognized a petition to secure placement of an initiative or a referendum on the ballot as a forum for political expression. See *Doe v. Reed*, 130 S. Ct. 2811, 2817–18 (2010). Thus, *Doe* arguably “silently overrules” the *Burdick* and *Timmons* precedent that the ballot is not an expressive forum due First Amendment protection. See Rick Hasen, *Initial Thoughts on Doe v. Reed*, ELECTION LAW BLOG (June 24, 2010, 11:22 AM), <http://electionlawblog.org/archives/016266.html>.

This Comment, however, assumes that *Burdick* and *Timmons* remain binding because the Court did not expressly overturn the precedent. This Comment’s analysis remains the same in either situation though, as New Jersey is free to guarantee its own state’s constitutional rights regardless of how the Supreme Court interprets the corresponding rights in the U.S. Constitution. See discussion *infra* Part III.A.

¹⁰⁶ Oregon has repealed its anti-fusion ban, allowing the cross-nomination of candidates for the first time since the Progressive Era. Jeff Mapes, *Bill Loosens Parties’ Hold on Elections*, THE OREGONIAN, July 6, 2009. Connecticut greatly expanded its fusion voting system in 2007. See 2007 Conn. Pub. Acts No. 07-194 (Reg. Sess.). Maine also held hearings in 2008 on a fusion voting bill before the legislature. See LD 1799, 123rd Me. Leg., 1st Reg. Sess. (Me. 2007).

is a minor revival of interest in fusion voting, the two major parties still use their strength to block legislative attempts to enact fusion, since the parties view fusion as a threat to their inherent power advantage under the current two-party system.¹⁰⁷ As a result, there is a need for state constitutional challenges that aim to rescind the anti-fusion laws and the burdens that they impose on minor parties and their members.

III. NEW JERSEY MUST INDEPENDENTLY ANALYZE FUSION VOTING PURSUANT TO THE NEW JERSEY CONSTITUTION

A. *The New Jersey State Constitution*

A state has the “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”¹⁰⁸ State courts, through reliance on the state constitution, have the ability to revive constitutional issues that the United States Supreme Court has settled.¹⁰⁹ States have used state constitutional provisions to guarantee and protect a broader set of rights associated with elections, even in the face of the Supreme Court’s explicit rejection of the existence of a federally protected right.¹¹⁰

¹⁰⁷ For example, Democratic Party officials largely resisted the fusion legislation in Oregon and considered pressuring the Governor to veto the measure. See Mapes, *supra* note 106.

¹⁰⁸ *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980).

In our federal system, state constitutions have a significant role to play as protectors of individual rights and liberties. This role derives its character from the freedom of state courts to move beyond the protections provided by federal doctrine and from the distinctive character of state courts and state constitutions. . . . The present function of state constitutions is as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law.

Developments in the Law—Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324, 1367 (1982).

¹⁰⁹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (arguing that “the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law”).

¹¹⁰ Compare *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008) (declaring that Indiana’s requirement for voters to show photo identification did not violate the Equal Protection Clause of the United States Constitution), with *League of Women Voters of Ind., Inc. v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App. 2009) (declaring that Indiana’s photo identification requirement for voters violated the state constitution’s Equal Privileges and Immunities Clause), *superseded in part*, 929 N.E.2d 758, 760–61 (Ind. 2010) (finding the law facially constitutional, but leaving open the possibility of future as-applied challenges under the state constitution).

New Jersey courts have a history of looking to the state constitution instead of the Federal Constitution as an individual source of robust civil liberties and rights.¹¹¹ New Jersey's constitution is a "separate fount of liberty" that the courts "must enforce."¹¹² The New Jersey Supreme Court has not hesitated to declare statutes unconstitutional pursuant to the state constitution, regardless of the legislation's validity pursuant to federal law.¹¹³

New Jersey determines when to apply federal or state constitutional provisions depending on the issue and the constitutional right before the court,¹¹⁴ as well as whether the United States Supreme Court has *adequately* addressed the issue at hand.¹¹⁵ When the federal courts fail to provide adequate protection of individual rights, then New Jersey's courts will turn to the state constitution to ensure that an individual's rights are fully guaranteed and protected.¹¹⁶ This Comment will demonstrate that the Supreme Court, in *Timmons*, did not adequately resolve the question of whether anti-fusion statutes infringe on party and voter associational rights in light of New Jersey's

¹¹¹ See *State v. Hunt*, 450 A.2d 952, 963 (N.J. 1982) (Handler, J., concurring); see also *Greenberg v. Kimmelman* 494 A.2d 294, 302 (N.J. 1985); *Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells*, 7 A.3d 720, 764 n.17 (N.J. 2010) (Rivera-Soto, J., dissenting) ("[W]here the [New Jersey] Constitution provides protections more expansive than those embodied in the Federal Constitution, [the New Jersey Supreme Court is] not constrained by the limitations that the latter would impose.").

¹¹² *Hunt*, 450 A.2d at 960 (Pashman, J., concurring).

¹¹³ See, e.g., *State v. Baker*, 405 A.2d 368, 374–75 (N.J. 1979) (holding that a municipal zoning ordinance prohibiting four or more unrelated individuals from living together was unconstitutional pursuant to the New Jersey Constitution despite the United States Supreme Court upholding such an ordinance under the federal constitution); see also *State v. Celmer*, 404 A.2d 1 (N.J. 1979); *Smith v. Penta*, 405 A.2d 350, 358 (N.J. 1979) (Pashman, J., dissenting).

¹¹⁴ See William F. Cook, *The New Jersey Bill of Rights and a "Similarity Factors" Analysis*, 34 RUTGERS L.J. 1125, 1159 (2003).

¹¹⁵ See *Horizon Health Ctr. v. Felicissimo*, 638 A.2d 1260, 1272–73 (N.J. 1994).

¹¹⁶ Compare *State v. Pierce*, 642 A.2d 947 (N.J. 1994), with *New York v. Belton*, 453 U.S. 454 (1981) (warrantless automobile searches); compare *State v. Hempele*, 576 A.2d 793 (N.J. 1990), with *California v. Greenwood*, 486 U.S. 35 (1988) (privacy interest in curbside garbage); compare *State v. Novembrino*, 519 A.2d 820 (N.J. 1987), with *United States v. Leon*, 468 U.S. 897 (1984) (good-faith exception to Fourth Amendment's exclusionary rule); compare *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982), with *Harris v. McRae*, 448 U.S. 297 (1980) (right to access medically necessary abortion for impoverished women); compare *State v. Hunt*, 450 A.2d 952 (N.J. 1982), with *Smith v. Maryland*, 442 U.S. 735 (1979) (right to access defendant's billing records); compare *State v. Johnson*, 346 A.2d 66 (N.J. 1975), with *Schneklath v. Bustamonte*, 412 U.S. 218 (1973) (consent to search); compare *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (constitutional right of public education).

broad protection of rights and given New Jersey's unique political environment.

B. The New Jersey Constitution's Independent Source of Individual Rights

New Jersey has seven divergent factors—the *Hunt* factors—to determine whether to analyze an issue under the state constitution or to rely on the Federal Constitution.¹¹⁷ In *State v. Hunt*, Justice Handler in a concurring opinion outlined seven factors for New Jersey courts to consider when analyzing whether the New Jersey Constitution affords greater liberties and rights than a similar or parallel federal constitutional provision.¹¹⁸ The factors “provide a basis for rejecting the constraints of federal doctrine at the state level.”¹¹⁹ The seven factors are: (1) textual language, (2) legislative history, (3) pre-existing state law, (4) structural differences, (5) matters of particular state interest or local concern, (6) state traditions, and (7) public attitudes.¹²⁰ The New Jersey Supreme Court later adopted these factors for state courts to consider when determining whether to conduct an independent state constitutional analysis.¹²¹ An analysis of the *Hunt* factors leads to the conclusion that the New Jersey Supreme Court must invoke the State constitution as an independent foundation for protecting and guaranteeing the rights of free association and expression, and not adhere to *Timmons*.

¹¹⁷ See, e.g., N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 770, 777 (N.J. 1994) (relying on the *Hunt* factors to declare that the free speech provision in New Jersey's Constitution protected an organization's right to hand out leaflets at a mall even though the First Amendment did not protect this expressive activity); State v. Muhammad, 678 A.2d 164, 173–75 (N.J. 1996); State v. Sanchez, 609 A.2d 400, 407–08 (N.J. 1992); State v. Novembrino, 519 A.2d 820, 850 (N.J. 1987). But see Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 81–84 (2006) (discussing the New Jersey Supreme Court's inconsistent application of the *Hunt* factors).

¹¹⁸ See State v. Hunt, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring).

¹¹⁹ *Id.* at 965–66.

¹²⁰ *Id.* at 965–67.

¹²¹ See State v. Williams, 459 A.2d 641, 650–51 (N.J. 1983).

1. Factors One, Two, Four and Six: Text, History, Structure, and Tradition

The textual language,¹²² legislative history,¹²³ structural differences¹²⁴ and state traditions factors¹²⁵ contain significant overlap. Thus, this Comment will discuss these factors together.

In *State v. Schmid*, the New Jersey Supreme Court analyzed the history, structure, and application of the State constitution's free speech and assembly provisions in depth.¹²⁶ The court determined that the free speech right in the New Jersey Constitution is an explicit affirmation of an individual's rights that the government has an express duty to protect.¹²⁷

The affirmative grant of rights is structurally different than the Bill of Rights, which is expressly limited to prohibiting certain government actions.¹²⁸ The legislative history of New Jersey's constitutional free speech provision demonstrates the framers' intent to provide a more expansive protection of that right than the First Amendment.¹²⁹ This history and tradition supports the robust protec-

¹²² Textual language applies in one of two situations—when the State constitution guarantees a right not protected in the Federal Constitution and when the phrasing of the two clauses is significantly different. *Hunt*, 450 A.2d at 965 (Handler, J., concurring).

¹²³ “[L]egislative history may reveal an intention that will support reading the provision independently of federal law.” *Id.*

¹²⁴

The United States Constitution is a grant of enumerated powers to the federal government. Our State Constitution, on the other hand, serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence, the explicit affirmation of fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them.

Id. at 966 (internal citations omitted).

¹²⁵ “A state’s history and traditions may also provide a basis for the independent application of its constitution.” *Id.* at 966.

¹²⁶ *State v. Schmid*, 423 A.2d 615, 624–28 (N.J. 1980).

¹²⁷ *Id.* at 627–28.

¹²⁸ *Id.* at 627 (“[T]he explicit affirmation of these fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them.”). The First Amendment is a restriction on the federal government, as well as on state governments, through the Fourteenth Amendment. *Id.*

¹²⁹ *State v. Hunt*, 450 A.2d 952, 965 (N.J. 1982) (Handler, J., concurring) (citing *Schmid*, 423 A.2d at 626–27; *Maressa v. New Jersey Monthly*, 445 A.2d 376, 392–93 (N.J. 1982) (Schreiber, J., dissenting)). But see John B. Wefing, *The Performance of the New Jersey Supreme Court at the Opening of the Twenty-First Century: New Cast, Same Script*, 32 SETON HALL L. REV. 769, 811 n.218 (2003) (observing that *Schmid* stated that New Jersey adopted its own free speech provision from the New York Constitution, whose provision was adopted from the Connecticut Constitution, yet both New York and Connecticut reached a different result in analyzing free speech in connection with

tion of an individual's expressive rights.¹³⁰ Therefore, the New Jersey Supreme Court must analyze the anti-fusion law under the broader and more robust free speech provision of the New Jersey Constitution in order to fully protect the parties' and voters' freedoms of association and expression.

2. Factor Three: Pre-Existing State Law

The New Jersey Supreme Court has protected free speech and press rights, under paragraph 6 of the New Jersey Constitution, more expansively than a First Amendment analysis would guarantee.¹³¹ Since *Schmid*, New Jersey courts have demonstrated a willingness to guarantee broad rights of speech and assembly, pursuant to Article I, paragraphs 6 and 18 of the state constitution.¹³² The New Jersey Supreme has further enhanced and defined the doctrine of strong protection for "the right of every person and of every group to make their views known, however popular or unpopular they may be, and the right of the public to hear them and learn from them."¹³³

Schmid and its progeny concern political speech on private property. In *Schmid*, the New Jersey Supreme Court held that an individual, who distributed political materials at a private university but was not a student, could not be convicted of trespassing upon private property.¹³⁴ The court held that private property rights can be rea-

distributing pamphlets in a mall in cases similar to *New Jersey Coalition Against War* (citing *Shad Alliance v. Smith Haven Mall*, 488 N.E.2d 1211 (N.Y. 1985); *Cologne v. Westfarms Assocs.*, 469 A.2d 1201 (Conn. 1984))).

¹³⁰ See *Schmid*, 423 A.2d at 626–27 (emphasizing New Jersey's strong tradition of guaranteeing individual expressional and associational rights in holding that the New Jersey Constitution provided greater protections for the right to free speech than those found in the Federal Constitution). In *Green Party*, the New Jersey Supreme Court noted that, historically, New Jersey found itself in the middle of legal debates analyzing the freedom of speech and assembly. See *Green Party v. Hartz Mt. Indus.*, 752 A.2d 315, 321 (N.J. 2000).

¹³¹ See, e.g., *Green Party*, 752 A.2d 315; *Rocci v. Ecole Secondaire Mac-Donald-Cartier*, 755 A.2d 583, 586 (N.J. 2000); *New Jersey Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994); *Sisler v. Gannett Co.*, 516 A.2d 1083, 1092–93 (N.J. 1986); *Schmid*, 423 A.2d 615.

¹³² See *Schmid*, 423 A.2d at 626 (referring to provisions in paragraphs 6 and 18 as "more sweeping in scope than the First Amendment"); *New Jersey Coal. Against War*, 650 A.2d at 770 ("Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment."); *Green Party*, 752 A.2d at 325 ("[T]he New Jersey's Constitution's free speech provision is an affirmative right, broader than practically all others in the nation . . .").

¹³³ *New Jersey Coal. Against War*, 650 A.2d at 780.

¹³⁴ *Schmid*, 423 A.2d at 616, 633.

sonably restricted to protect the rights of free speech and assembly guaranteed in the state constitution.¹³⁵

Nevertheless, ignoring the political expression at the core of these cases and solely viewing the broad freedom of speech protection as strictly limited to the private property setting is improper. It would be inconsistent for the New Jersey Constitution to broadly protect expressive acts against oppressive and unreasonably restrictive private conduct but then simultaneously allow the government to restrict expression by engaging in the same conduct as the private actors.¹³⁶

At times, however, New Jersey courts have indicated that the free speech analysis under the New Jersey Constitution is co-extensive with an analysis under the First Amendment.¹³⁷ But in free speech cases where the New Jersey Supreme Court chose to apply the Federal Constitution instead of the state constitution, the speech at hand was commercial speech rather than political expression.¹³⁸

Political speech warrants more constitutional protection than commercial speech because free and open political expression is at

¹³⁵ *Id.* at 630.

¹³⁶ *Schmid*, in emphasizing the “affirmative grants of rights” protected in Article I, paragraphs 6 and 18 of the New Jersey Constitution, “makes it clear that New Jersey’s more expansive protection for freedom of expression is not limited to its applicability to private infringements.” Frank Askin, *Free-er Speech in New Jersey*, 161 N.J. LAW. 12, 13 (1994); see also Cook, *supra* note 114, at 1144 n.146 (arguing that it is inappropriate to narrowly view *Schmid* as just discussing property rights rather than political speech).

¹³⁷ See *Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137, 1141–42 (N.J. 1998); see also *Twp. of Pennsauken v. Schad*, 733 A.2d 1159, 1169 (N.J. 1999); *Bell v. Twp. of Stafford*, 541 A.2d 692, 697 (N.J. 1988).

¹³⁸ For example, *Hamilton* concerned the State’s regulation of signs used in sexually oriented businesses. *Hamilton*, 716 A.2d at 1140. Another case where the New Jersey Supreme Court relied on federal analysis, as opposed to conducting an independent state constitution free speech analysis, involved not protecting a fireman’s drunken racial slur as free speech. See *Karins v. City of Atlantic City*, 706 A.2d 706, 716 (N.J. 1998). Neither these commercial speech examples, nor a racial slur, can be equated with the important nature of political expression and association. For a discussion arguing how the Court’s reliance on precedent in *Hamilton Amusement* to determine that the New Jersey Constitution and First Amendment free speech provisions are analyzed co-extensively is faulty and “lack[s] a sturdy analysis of state constitutional law,” see Cook, *supra* note 114, at 1146–47 (arguing that the cases that *Hamilton* relied upon to establish the premise of co-existing free speech provisions either discussed other provisions in the State Constitution and Federal Constitution (*Shelton College v. State Bd. of Educ.*, 226 A.2d 612 (N.J. 1967)) or failed to even mention Article I, paragraph 6 (*Bell v. Twp. of Stafford*, 541 A.2d 692 (N.J. 1988))).

the core of a democracy.¹³⁹ The New Jersey Supreme Court has frequently distinguished the importance of political speech over commercial speech, declaring that political expression “occupies a preferred position” among other constitutionally protected rights.¹⁴⁰ When political speech is involved, New Jersey tradition insists that the government “allow the widest room for discussion, the narrowest range for its restriction.”¹⁴¹ Therefore, an analysis of the anti-fusion law, which inhibits a party’s core political activity—association and expression—must follow the jurisprudence of prior political speech cases in New Jersey, which have applied the broad, free-speech protections of the New Jersey Constitution, as opposed to commercial speech cases, which have not.

3. Factor Five: Matters of Particular State Interest or Local Concern

The Supreme Court’s analysis in *Timmons* is not sufficient because it fails to consider New Jersey’s unique and individual jurisprudence and political structure.¹⁴² Justice Handler recognized that some issues are either “uniquely appropriate for independent state action,”¹⁴³ or so “local in character, and do not appear to require a uniform national policy, [that] they are ripe for decision under state law.”¹⁴⁴ New Jersey has its own political culture and environment that gives rise to distinctive characteristics in the political and electoral process.

The United States Supreme Court found that a fusion ban was only a minor burden on a party’s associational rights.¹⁴⁵ Thus, the Court did not require that a regulation banning fusion be narrowly

¹³⁹ See *New Jersey Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 781–82 (N.J. 1994); *Barry v. Arrow Pontiac, Inc.*, 494 A.2d 804, 812 (N.J. 1985).

¹⁴⁰ See *State v. Schmid*, 423 A.2d 615, 627 (N.J. 1980) (quoting *State v. Miller*, 416 A.2d 821, 826 (N.J. 1980)).

¹⁴¹ *Id.* (quoting *Miller*, 416 A.2d at 826).

¹⁴² The United States Supreme Court, by its nature, must develop laws of general applicability that each state is required to follow. The Supreme Court has to focus on a national perspective, while the New Jersey Supreme Court must tailor its analysis to the local state issue. See *supra* note 104 and accompanying text.

¹⁴³ *State v. Hunt*, 450 A.2d 952, 966 (N.J. 1982) (Handler, J., concurring) (citing *State v. Alston*, 440 A.2d 1311, 1319 (N.J. 1981)).

¹⁴⁴ *Id.* (Handler, J., concurring) (citing *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976); *Cooley v. Bd. of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851)).

¹⁴⁵ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362–64 (1997); see also *supra* text accompanying note 96.

tailored to achieve a valid state interest.¹⁴⁶ New Jersey, however, would not characterize this infringement as a minor burden,¹⁴⁷ given the state's "strong tradition of protecting individual expressional and associational rights."¹⁴⁸ The fact that a political organization is the victim of discrimination contributes to the severity of the burden.¹⁴⁹

New Jersey law guarantees that the election system will robustly protect individuals and parties. New Jersey election statutes must "allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day."¹⁵⁰

The pre-existing rights of third parties in New Jersey and the state's political system make the issue a matter of local concern. For example, New Jersey has a generous ballot access law, which requires a low number of signatures for any candidate to obtain access to the ballot,¹⁵¹ and that requirement is even lower for a minor party petition candidate.¹⁵² The candidate in *Timmons* was required to obtain five-times as many signatures pursuant to Minnesota's election laws in

¹⁴⁶ *Timmons*, 520 U.S. at 358–60; see also *supra* text accompanying notes 97–98.

¹⁴⁷ *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980) ("The State Constitution . . . serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof."); *State v. Klapprott*, 22 A.2d 877, 880 (N.J. Sup. Ct. 1941) (A legislative act cannot limit or restrict the constitutional "guarantees of freedom of assemblage and speech and freedom to communicate information and opinions to others.").

¹⁴⁸ See *Hunt*, 450 A.2d at 966 (Handler, J., concurring); see discussion *supra* Part III.B.1–2.

¹⁴⁹ See *Council of Alt. Political Parties v. State*, 781 A.2d 1041, 1046 (N.J. Super. Ct. App. Div. 2001) (citing *Council of Alt. Political Parties v. State*, No. MER-C-6-99 (N.J. Super. Ct. Ch. Div. Apr. 25, 2000) (Parrillo, J.)).

¹⁵⁰ *N.J. Democratic Party v. Samson*, 814 A.2d 1028, 1036 (N.J. 2002) (quoting *Catania v. Haberle*, 588 A.2d 374, 379 (N.J. 1991)).

¹⁵¹ See *Council of Alt. Political Parties*, 781 A.2d at 1053 (referring to New Jersey's "liberal ballot access laws"). The ballot access requirement for a petition nomination has remained unchanged since the late-nineteenth century despite the significant increase in New Jersey's population. In 1898, the number of signatures required to secure a nomination by petition was 800 for a statewide office and no more than 100 signatures for an office that did not represent the state at-large. 1898 N.J. Sess. Law, c. 139, sec. 41, at p. 257.

¹⁵² Compare N.J. STAT. ANN. § 19:13-5 (West 2010) (requiring a candidate for a statewide office seeking access on the ballot through petition to secure 800 signatures), with *id.* § 19:23-8 (requiring a candidate for a statewide office of a major party conducting a primary election to secure 1,000 signatures).

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order to reach the ballot through petition.¹⁵³ New Jersey further aids minor parties by allowing them to access the ballot solely through securing the requisite number of signatures for a petition, whereas the major parties must conduct a primary first.¹⁵⁴ These two advantages for minor parties may seem insignificant, but they are indicative of the fact that the State is already providing additional rights to minor parties. Therefore, a fusion law that benefits minor parties would not contravene the previously expressed policies of New Jersey.

4. Additional Factor: Little or No Chance of a Legislative Remedy

Given the strength of the two major parties and the established interests that they may have in not granting any further rights or access to the minor parties, there is little chance of the New Jersey Legislature remedying the situation on its own.¹⁵⁵ Judicial action is needed when there is little or no chance of a legislative remedy. Furthermore, New Jersey courts have recently moved in the direction of granting more rights to third parties and partially reducing the substantial advantage that the two major parties have over minor parties.¹⁵⁶

The strong presumption resulting from the *Hunt* factors analysis is that, in the absence of federal protection, the New Jersey Supreme Court must rely on an independent state constitutional analysis to

¹⁵³ Compare MINN. STAT. § 204B.07 (1994) (requiring petition candidates for state legislative offices to collect the lesser of 500 signatures or of 10% of the individuals living within the district), with N.J. STAT. ANN. § 19:13-5 (requiring no more than 100 signatures for petitions for any office that is not statewide).

¹⁵⁴ See N.J. STAT. ANN. § 19:13-5; see also *Council of Alt. Political Parties v. Hooks*, 179 F.3d 64, 79 (3d Cir. 1999) (opining that New Jersey's two separate methods of granting ballot access "places a heavier burden on the [major] party candidates").

¹⁵⁵ See *Council of Alt. Political Parties*, 781 A.2d at 1046 (citing *Council of Alt. Political Parties v. State*, No. MER-C-6-99 (N.J. Super. Ct. Ch. Div. Apr. 25, 2000) (Parrillo, J.)). But see *Smith v. Penta*, 405 A.2d 350, 357 (N.J. 1979) (Change to the two-party system "must come from the legislature or from the people. It cannot come from the courts.").

Only one legislature (Connecticut), in at least seventy years, expanded its state's fusion system and only one legislature (Oregon), over the past eighty years, repealed its state's fusion ban. Dan Cantor, *Reviving a Lost Tool of Democracy: Prospects for Expanded Fusion Voting*, TPMCAFE, (July 11, 2007, 9:52 AM), http://tpmcafe.talkingpointsmemo.com/2007/07/11/reviving_a_lost_tool_of_democr; Richard Winger, *Oregon Legalizes Fusion*, BALLOT ACCESS NEWS (Aug. 1, 2009), <http://www.ballot-access.org/2009/080109.html#2>.

¹⁵⁶ See, e.g., *Council of Alt. Political Parties*, 781 A.2d. at 1043, 1051 (ordering that the State allow voters to register as members of certain minor parties and declaring unconstitutional the State's practice of distributing voter information for free to the major parties and at a charge to the minor parties).

guarantee the broad associational and expressive rights of parties and voters upon which the anti-fusion law infringes.

IV. NEW JERSEY STATE CONSTITUTIONAL ANALYSIS

New Jersey's anti-fusion law unconstitutionally burdens the associational rights of minor parties and candidates by regulating the internal decision-making process of a party and preventing the party from nominating its desired standard bearer. The fusion ban also violates the expressive rights of voters and minor parties by limiting a voter's right to engage in political speech through the ballot and by infringing upon a minor party's right to convey its political message to the public through a candidate who best represents the party's principles. The anti-fusion law, however, does not unconstitutionally violate the right to vote because the burden on voter choice is not severe.

A. *New Jersey's Balancing Approach to State Constitutional Rights*

When adjudicating claims of infringement upon state-protected constitutional rights, New Jersey does not tend to use strict classifications (as federal courts do¹⁵⁷) for the competing State interests and alleged constitutional violations.¹⁵⁸ Rejecting the federal approach when applying state constitutional provisions, the New Jersey Supreme Court has pronounced that “[r]ather than to slot cases into tiers of strict scrutiny or narrow tailoring, we have attempted in constitutional analysis to balance the competing interests, giving proper weight to the constitutional values.”¹⁵⁹

¹⁵⁷ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The test that the United States Supreme Court used in *Timmons* clearly involves multiple classifications—one for the burden on the right and one for the state's justification. In *Timmons*, the Court determined that the infringement on the New Party's freedom of association right was “not severe,” thus, Minnesota's prohibition on fusion did not need to be narrowly tailored in order to achieve the State's legitimate interests. *Timmons*, 520 U.S. at 358.

¹⁵⁸ See *Green Party v. Hartz Mt. Indus.*, 752 A.2d 315, 327 (N.J. 2000). Adhering to strict classifications creates “a veil of tiers which shrouds [the] essential issue.” *Id.* (quoting *Matthews v. Atlantic City*, 417 A.2d 1011, 1023 (1980) (Clifford, J., dissenting)).

¹⁵⁹ *Id.* at 327. In *Green Party*, a political organization wished to collect signatures for a candidate's nomination petition at a private mall. The New Jersey Supreme Court had to balance a political organization's rights to free speech and assembly against the private property rights of a mall. *Id.* at 327–28.

The New Jersey Supreme Court uses a balancing test that weighs competing interests and rights to determine the constitutionality¹⁶⁰ of a statute pursuant to the New Jersey Constitution.¹⁶¹ The balancing approach operates as a sliding scale which “giv[es] proper weight to the constitutional values [involved]. . . . The more important the constitutional right sought to be exercised, the greater the . . . need must be to justify interference with the exercise of that right.”¹⁶² New Jersey courts have specifically used a balancing test in recent years to determine the constitutionality of election statutes.¹⁶³ When analyzing whether the anti-fusion laws infringe on a party’s or individual’s rights of expression and association, the New Jersey Supreme Court will give the utmost weight to the rights to vote¹⁶⁴ and to freely express oneself politically¹⁶⁵ against any competing State interests that infringe upon them because these rights are at the center of a free and democratic political system.

¹⁶⁰ New Jersey statutes are presumed to be constitutional when challenged. *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006).

¹⁶¹ See, e.g., *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners Assoc.*, 929 A.2d 1060 (N.J. 2007) (balancing an individual’s expressional rights against homeowner association’s property rights); *New Jersey Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994) (balancing right to political speech against rights of property owner); *Murray v. Lawson*, 649 A.2d 1253 (N.J. 1994) (balancing right of protestors and property rights of privacy in residence); *In re Randolph*, 502 A.2d 503 (N.J. 1986) (balancing employee’s free speech and association rights against a nonpartisan judiciary); *State v. Williams*, 459 A.2d 641 (N.J. 1983) (balancing the rights of the press and the public to access pretrial proceedings and a defendant’s right to a fair and impartial jury).

¹⁶² *Green Party*, 752 A.2d at 327 (N.J. 2000) (citing *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985); *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971)).

¹⁶³ See, e.g., *In re Attorney Gen.’s “Directive on Exit Polling: Media and Non-Partisan Public Interest Groups,”* 981 A.2d 64, 76–80 (N.J. 2009) (determining that protecting the right to vote unobstructed outweighed non-profit organizations’ right of free speech to distribute voting-rights pamphlets as well as the free press and speech rights of media organization to conduct exit polling outside a polling place on election day); *Council of Alt. Political Parties v. State*, 781 A.2d 1041 (N.J. Super. Ct. App. Div. 2001) (determining that the burdens on New Jersey’s minor parties’ freedom of speech and association and equal protection rights outweighed the State’s competing interest in justifying those burdens).

¹⁶⁴ See *Gangemi v. Rosengard*, 207A.2d 665, 667 (N.J. 1965) (noting that the right to vote “is the keystone of a truly democratic society.”).

¹⁶⁵ See *State v. Miller*, 416 A.2d 821, 826 (N.J. 1980) (observing that “political speech . . . occupies a preferred position in our system of constitutionally-protected interests”); *Hudson Cnty. News Co. v. Sills*, 195 A.2d 626, 633 (N.J. 1963) (“The great freedoms of expression are invaluable rights guaranteed by both our State and Federal Constitutions and they must be vigilantly guarded.”).

B. *Constitutional Burdens*

The New Jersey Constitution affirmatively grants the right of free speech to its citizens.¹⁶⁶ Each citizen has the right to assemble and petition the government.¹⁶⁷ New Jersey has recognized the right of association in numerous cases dealing with political parties and their members.¹⁶⁸ The right to vote is a fundamental right in the New Jersey Constitution¹⁶⁹ and it contains a derivative right of voter choice, but not a corresponding right to run for office.¹⁷⁰

1. Free Association

The freedom of association protects parties, candidates, and individual voters. Associational rights guarantee “not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify people who constitute the association, and to select a standard bearer who

¹⁶⁶ N.J. CONST. art. I, para. 6.

¹⁶⁷ N.J. CONST. art. I, para. 18.

¹⁶⁸ *E.g.*, *Smith v. Penta*, 405 A.2d 350, 356–57 (N.J. 1979) (holding that the associational rights of parties is an important interest that the closed primary system protects); *Lesniak v. Budzash*, 626 A.2d 1073, 1081 (N.J. 1993) (discussing a voter’s right to associate with the party of his choice and a party’s right of association in the candidate nomination process).

¹⁶⁹ N.J. CONST. art. II, sec. I, para. 3; *see also In re Attorney Gen.’s “Directive on Exit Polling: Media and Non-Partisan Public Interest Groups,”* 981 A.2d 64, 75 (N.J. 2009) (noting that the New Jersey State Constitution designates one entire article to “enumerating the rights and duties associated with elections and suffrage” (citing N.J. CONST. art. II)).

¹⁷⁰ The right to vote in New Jersey does not contain a fundamental right to be a candidate. *See Batko v. Sayreville Democratic Org.*, 860 A.2d 967, 971 (N.J. Super. Ct. App. Div. 2004) (citing *McCann v. Clerk of City of Jersey City*, 771 A.2d 1123, 1131 (2001)); *see also Matthews v. Atlantic City*, 417 A.2d 1011, 1016 (N.J. 1980) (“With regard to the individual interests involved, we recognize that the right to be a candidate for office has never been held by either the United States Supreme Court or this Court to enjoy ‘fundamental’ status.” (citing *Wurtzel v. Falcey*, 354 A.2d 617 (N.J. 1976))); *Stothers v. Martini*, 79 A.2d 857, 859 (N.J. 1951). New Jersey has recognized that “[t]he right to run for and hold public office is a *valuable* one” *Cottingham v. Voight*, 160 A.2d 57, 60 (N.J. Super. Ct. App. Div. 1960) (emphasis added); *see also Stothers*, 79 A.2d at 859 (N.J. 1951) (quoting *In re Ray*, 56 A.2d 761, 763, 765 (Gloucester County Cir. Ct. 1947)).

A statute restraining the eligibility to run for office is a restriction on the right to vote, but it is not an unconstitutional violation of the right to vote. *See Gangemi v. Rosengard*, 207A.2d 665, 667 (N.J. 1965). For example, New Jersey has upheld a prohibition of a candidate’s ability to run as a third party or independent candidate subsequent to losing a primary nomination. *Sadloch v. Allan*, 135 A.2d 173, 178–79 (N.J. 1957). Since there is no fundamental right to run for office or be a candidate, an individual does not have a right to run as a specific party’s candidate for office.

best represents the party's ideologies and preferences."¹⁷¹ Freedom of association protects parties in order to guarantee that individuals can gather together for a common purpose and coordinate to achieve expressive goals.¹⁷² Anti-fusion laws can significantly inhibit this core function.¹⁷³

a. A Minor Party's Right of Free Association

New Jersey's anti-fusion law is an unconstitutional violation of a minor party's right of free association. Political parties have associational rights in selecting a nominee that the State must protect because the process "affords an opportunity to adherents of some political philosophy to advance their goals, proselytize their beliefs and seek to acquire or perpetuate their power."¹⁷⁴ The fusion ban limits the core associational function of parties—choosing a standard bearer—and infringes on a party's internal nomination process.

The fusion ban burdens a party's associational rights because the party is unable to select its desired standard bearer to represent it on the ballot in the general election. The right to select a candidate to carry the party's platform and deliver arguments to the public is the core associational right of any political party. New Jersey has a history of supporting the notion that parties can select as a nominee the person who best represents their philosophies.¹⁷⁵

Nominating a candidate is a mechanism by which the party can introduce itself to the public, share its views, and attract like-minded voters and supporters.¹⁷⁶ To win a nomination, a party and its mem-

¹⁷¹ *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (internal quotations omitted).

¹⁷² *See Berger*, *supra* note 8, at 1394.

¹⁷³ *See id.* New Jersey's fusion ban does not unconstitutionally infringe upon a voter's right of association. An individual voter undoubtedly has the right to associate with the party of his choice. *See Lesniak v. Budzash*, 626 A.2d 1073, 1081 (N.J. 1993). The anti-fusion statute, however, does not limit or impede an individual from associating with a minor party. *See* Brief for Petitioners at *10, 31, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (No. 95-1608), 1996 WL 435927. The fusion ban does not stop an individual from voting for a minor party at the polling place. The voter can still associate with a minor party's desired candidate on another party line and the infringement is more on the candidate and the minor party who are blocked from associating with each other. No State law or constitutional belief supports the notion that an individual voter has the right to associate with a candidate under a specific party banner.

¹⁷⁴ *See Smith v. Penta*, 405 A.2d 350, 356 (N.J. 1979).

¹⁷⁵ *See Stevenson v. Gilfert*, 100 A.2d 490, 494–95 (N.J. 1953).

¹⁷⁶ *See* Brief for Republican National Committee as Amicus Curiae supporting Respondent at *7–8, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)

bers must accept some, or most, of the candidate's views. Since a candidate represents the party and a candidate conveys his beliefs to the public, infringing on a party's selection of a candidate necessarily inhibits the party's ability to speak to the public and attempt to broaden its base of support.¹⁷⁷ Building party support by nominating candidates who are not the first choice is extremely difficult. A voter will vote for the stronger candidate, even if that voter is a member of the minor party.

Furthermore, the State's regulation of internal party affairs, specifically with the nomination process, infringes upon a party's associational rights. The New Jersey Legislature grants parties the right to nominate a candidate to represent the party on the ballot.¹⁷⁸ Once the Legislature has given that right to a party, it cannot limit or infringe upon it by preventing the party from nominating a candidate that is qualified to hold the office.¹⁷⁹ The Legislature cannot prohibit one party from nominating a candidate just because he is a member of another party since "it certainly would be a step backward to say that a political party shall not select a good man for its candidate, perhaps a better man than they have in their own ranks, because he does not wear its style of political garment."¹⁸⁰ The fusion ban runs counter to this premise—it prevents a minor party from endorsing a candidate who is qualified to run for office—resulting in a direct burden on the party's internal governance and decision to associate with that candidate.

The New Jersey Supreme Court declared that parties must be able to freely decide who their nominee will be in an election on the basis of what the members want, not on the basis of what non-members decide in another nomination process.¹⁸¹ This is why New

(No. 95-1608), 1996 WL 470949 [hereinafter Brief for Republican National Committee].

¹⁷⁷ See *id.* at *11–12.

¹⁷⁸ See N.J. STAT. ANN. § 19:5-1 (West 2010) (major parties can nominate through primaries); *id.* § 19:13-1 (minor party and independent candidates can be nominated through petition).

¹⁷⁹ See *Gansz v. Johnson*, 75 A.2d 831, 832 (N.J. Super. Ct. Law Div. 1950).

¹⁸⁰ See *In re City Clerk of Paterson*, 88 A. 694, 696 (N.J. Sup. Ct. 1913).

¹⁸¹ See *Lesniak v. Budzash*, 626 A.2d 1073, 1081 (N.J. 1993) (noting that primary elections must "reflect the will of party members, undistorted by the votes of those unconcerned with, if not actually hostile to, the principles, philosophies, and goals of the party" (quoting *Smith v. Penta*, 405 A.2d 350, 353 (N.J. 1979))); see also *Stevenson v. Gilfert*, 100 A.2d 490, 492 (N.J. 1953) (Primary participation is partly justified "to repel interference from outsiders who are not bound by the common tie and do not share the common aim." (quoting *Wene v. Meyner*, 98 A.2d 573, 576 (N.J. 1953))).

Jersey allows parties to hold closed primaries.¹⁸² The State lets a party associate with only its members when selecting the party's candidate. In New Jersey, the tradition of holding closed primaries to prevent party raiding is long justified on the basis of a "keep out the enemies and adverse interests" mentality. The State has shown that it wants to protect a party's interests from those who wish to disrupt it by allowing association only with those voters who share the same goals and ideas. New Jersey has also upheld a law requiring that any substitute candidate be a member of the same political party in order to protect the associational right of the party to have its desired candidate.¹⁸³

The anti-fusion law declares that once a candidate accepts a nomination for a major party, a minor party is forbidden from choosing that same candidate as its own nominee.¹⁸⁴ The ban essentially gives one party the power to prevent another party from nominating a candidate, thus violating the established New Jersey principle that party members should be able to decide their nominee without the interference of non-party members. Furthermore, a third party would not nominate a major party candidate unless he shared the same goals as the party; fusion tickets would not fall within the "enemy" or "adverse interest" category from which the New Jersey Supreme Court has protected parties. Cross-nomination should fall within the hands-off approach that the State has taken in allowing parties to freely exercise their associational rights in selecting a candidate.

The State will argue that the cross-nomination ban does not affect or limit the "internal structure, governance, and policy-making" that are at the center of a party's associational rights.¹⁸⁵ The State will defend the constitutionality of the anti-fusion law, declaring that it does not violate a minor party's associational rights because that minor party has the power to nominate anyone who it can convince to be its candidate.¹⁸⁶ A party is still free to, and has the right to, persuade the candidate to accept the minor party's nomination instead of the major party's nomination.¹⁸⁷

The political reality in New Jersey makes this an impractical expectation. No major party nominee would forgo the Republican or

¹⁸² See *Smith*, 405 A.2d at 353, 356.

¹⁸³ See *Stevenson*, 100 A.2d at 495.

¹⁸⁴ See discussion *supra* notes 72–80 and accompanying text.

¹⁸⁵ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997).

¹⁸⁶ See *id.* at 360 (quoting *Swamp v. Kennedy*, 950 F.2d 383, 385 (7th Cir. 1991)).

¹⁸⁷ See *id.*

Democratic nomination to be a minor party candidate.¹⁸⁸ More importantly, this expectation is impossible, because pursuant to New Jersey's election law, once a candidate becomes a major party's nominee, he is not allowed to renounce that nomination in favor of a minor party's petition.¹⁸⁹

b. A Candidate's Right of Free Association

The fusion ban burdens the associational rights of a minor party's desired fusion candidate. The prohibition inhibits a candidate who has a major party nomination for an office from associating with any other party aside from that major party. This is an unconditional restriction on a candidate's associational rights because the State is dictating with whom he can or cannot associate.

New Jersey has previously declared that a statute requiring a candidate to certify that he is a member of that party before he could run in the primary was invalid as an arbitrary limitation of candidacy for an elected office.¹⁹⁰ The court wondered, "What exclusion could be more arbitrary than that one party organization should not be permitted to nominate a candidate who belonged to another party?"¹⁹¹

Through the anti-fusion statute, the Legislature is essentially stating that a candidate is unable to accept a minor party nomination solely because he is the candidate of another party. This rationale is the same type of arbitrary restriction upon a requirement for candidacy that New Jersey has previously deemed invalid.¹⁹²

The State will argue that, since the statute does not keep any candidates off the ballot, it does not violate any of the candidates' associational rights.¹⁹³ The objection to the ban, however, is not that it keeps a candidate off the ballot but that it keeps the party's desired

¹⁸⁸ See *N.J. Democratic Party v. Samson*, 814 A.2d 1028, 1041 (N.J. 2002) ("Although the participation of third-party candidates supports a robust democracy, we recognize the present reality of the two-party system as an organizing principle of the political process in this country."); *Friends of Governor Tom Kean v. N.J. Election Law Enforcement Comm'n*, 552 A.2d 612, 613 (N.J. 1989) (noting that elections and campaigns in New Jersey "take place . . . in the context of a partisan, party-based political system").

¹⁸⁹ See N.J. STAT. ANN. § 19:13-4 (West 2010) ("No such petition shall undertake to nominate any candidate who has accepted the nomination for the primary for such position."); *Sadloch v. Allan*, 135 A.2d 173, 176, 178-79 (N.J. 1957).

¹⁹⁰ *Gansz v. Johnson*, 75 A.2d 831, 832-33 (N.J. Super. Ct. Law Div. 1950).

¹⁹¹ *Id.* at 832.

¹⁹² See *id.*

¹⁹³ See Brief for Petitioners, *supra* note 173, at *19-20.

candidate from appearing on the ballot with that minor party's designation and seal of approval. This distinction is where the burden on a candidate's associational rights arises.

2. Free Expression

New Jersey is not bound by the same First Amendment limits as the federal courts are in interpreting expressive acts.¹⁹⁴ Where political speech is involved, New Jersey's tradition insists that government "allow the widest room for discussion, the narrowest range for its restriction."¹⁹⁵ Even though First Amendment jurisprudence does not mandate the protection of expression at the ballot,¹⁹⁶ New Jersey does not explicitly bar or restrict a voter's or party's expression at or through the ballot.¹⁹⁷ Rather, the State recognizes that the ballot, at least in part, is a means of expressive activity.¹⁹⁸ For example, New Jersey identifies an affirmative right of expression at the ballot through a write-in vote.¹⁹⁹

¹⁹⁴ See Berger, *supra* note 8, at 1415 ("State constitutions value voting more than the federal Constitution. Moreover, they offer more protection for expressive activities. Therefore, state courts should understand voting as an act of expression."). In *Timmons*, the New Party focused solely on associational rights given the Supreme Court's precedent in the area of associational rights, but not in voting as expression, thus forgoing an individual's expressive rights argument. *Id.* at 1395. The New Party argued that the ballot served an expressive function for parties; however, it did not argue an infringement on freedom of expression for an individual voter. *Id.* & 1395 n.101.

¹⁹⁵ See *State v. Schmid*, 423 A.2d 615, 627 (N.J. 1980) (quoting *State v. Miller*, 416 A.2d 821, 826 (N.J. 1980));

see also discussion *supra* Part III.B.1–2.

¹⁹⁶ See *Burdick v. Takushi*, 504 U.S. 428, 438, 441 (1992); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). For a discussion that the Court, in *Doe v. Reed*, 130 S. Ct. 2811 (2010), overruled *Burdick* and *Timmons* on this issue see *supra* note 105.

¹⁹⁷ See *Sadloch v. Allan*, 135 A.2d 173, 179 (N.J. 1957) (recognizing a right of voters to express a vote for a write-in candidate) (citing N.J. CONST. art. II, para. 3); *Stevenson v. Gilfert*, 100 A.2d 490 (N.J. 1953); see also *In re Gray-Sadler*, 753 A.2d 1101, 1105 (N.J. 2000). The Legislature's silence on this issue must be contrasted to the explicit bar on expressive activity in the 100-foot areas outside of any polling place. See N.J. STAT. ANN. § 19:34-6 (West 2010); *id.* § 19:34-7; *id.* § 19:34-15; see also *In re Attorney Gen.'s "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups,"* 981 A.2d 64, 71–75 (N.J. 2009).

¹⁹⁸ Cf. *Sadloch*, 135 A.2d at 179 (citing N.J. CONST. art. II, para. 3); see also Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells, 7 A.3d 720, 752 (N.J. 2010) (Rivera-Soto, J., dissenting) ("It is through the exercise of their right to vote that the people . . . can make themselves heard.").

¹⁹⁹ See N.J. STAT. ANN. § 19:49-5 (West 2010); see also *In re Ocean Cnty. Comm'r*, 879 A.2d 1174, 1181 (N.J. Super. Ct. App. Div. 2005).

Fusion voting is an expressive act in two ways.²⁰⁰ First, voting, at its core, represents an opportunity for individual voters to express their political views and preferences.²⁰¹ Expressing political beliefs through the nominee on the ballot, as opposed to using another forum, does not change the “essential expressive nature” of the speech.²⁰² Second, fusion allows minor parties to express the party’s platform and principles to the electorate in the most effective manner.²⁰³ Conversely, the State would argue that the ballot is for the purpose of electing officials;²⁰⁴ thus, voting and appearing on the ballot as a candidate should not constitute an expressive act.²⁰⁵

a. A Voter’s Right of Free Expression

New Jersey’s anti-fusion law prevents a voter from using the ballot as an expression of minor party support, of support for certain policies, and of a political message, namely dissatisfaction with the major parties.²⁰⁶ The New Jersey Supreme Court acknowledges the expressive nature of a voter, as a party member, selecting a candidate at the ballot.²⁰⁷

Voters can express messages and beliefs through fusion voting that are otherwise unavailable to them by voting for a candidate on a major party ticket or by voting for a third party candidate with no chance of winning. For example, fusion allows voters to explicitly

²⁰⁰ Berger, *supra* note 8, at 1393–94, 1394 n.94. See generally Winkler, *supra* note 18 (arguing for the development of a Federal Constitutional doctrine protecting the right to vote as a means of individual expression).

²⁰¹ See Berger, *supra* note 8, at 1393.

²⁰² See *id.* at 1414.

²⁰³ See *id.* at 1394.

²⁰⁴ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369 (1997) (noting that the “function of elections is to elect candidates”); *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

²⁰⁵ See *Timmons*, 520 U.S. at 363 (A party does not have an inherent “right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate.”).

²⁰⁶ See *Hynes v. Oradell*, 331 A.2d 277, 281 (N.J. 1975) (Pashman, J., dissenting) (“The right of candidates to make their positions known to the voters, and of voters to express their views on public issues to candidates for and holders of elective office is the very substance of the democratic process.”), *rev’d*, *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610 (1976); see also Berger, *supra* note 8, at 1414 (“By preventing parties and their supporters from nominating their selected candidates, anti-fusion laws run afoul of a long tradition of state protection for voter participation as expressed through political parties.”).

²⁰⁷ See *Wene v. Meyner*, 98 A.2d 573, 577 (N.J. 1953) (“A primary, after all, is a medium for expressing the preferences of those united under the party standard . . .”).

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declare that while they support a particular candidate, they want that candidate to govern more progressively or conservatively than a typical major party candidate or that they want the candidate to support a specific policy ideal espoused by the minor party.²⁰⁸ Thus, a voter is not just casting a ballot but also expressing and supporting a clear political agenda that he wants the candidate to follow in office. Fusion voting lets voters who are dissatisfied with the major parties indicate and express those views, while simultaneously retaining the ability to vote for a candidate who may ultimately be successful.²⁰⁹

Fusion voting gives individual voters, collectively, the opportunity to reach a greater audience with their message because the vote total that each candidate receives from a party's ballot communicates the voters' reasoning for choosing that candidate. Even in the unlikely event that the message does not reach the general public, it will surely reach the elected official who beats his opponent with a victory margin less than the number of expressive votes the minor party's members cast. The official will later have to represent and acknowledge the party's and its members' interests.²¹⁰ Without fusion voting, it is significantly more difficult and less efficient for a voter and a party to express their message and political beliefs.

b. A Minor Party's Right of Free Expression

The right to nominate one candidate to serve as the public face of the party "is inescapably an expressive right"²¹¹ — and arguably a party's *most* expressive statement²¹² — in addition to an associational

²⁰⁸ Voting for a third party candidate in a non-fusion system also can express this message; but it does not do so efficiently. The two major parties, and their elected officials, have no incentive to listen to the expressions of voters who cast a protest vote for a minor party candidate. These minor party candidates pose no threat to the two-party system and consequently the voters' expression has no subsequent effect on policy making or governance.

²⁰⁹ See *Timmons*, 520 U.S. at 381 (Stevens, J., dissenting).

²¹⁰ In Oregon, the Democratic Party resisted the fusion bill that was eventually signed into law. Mapes, *supra* note 106. The executive director of the state party based his opposition, in part, on the fact that minor parties could extract compromises on legislation and issues from a candidate in exchange for the minor party's endorsement. See *id.* This fear of compromising is certainly well-founded because compromise to achieve policy goals is one of the purposes of minor parties in a fusion system. See discussion *supra* notes 28, 38 and accompanying text. The executive director's comment also demonstrates how fusion voting is political expression.

²¹¹ *Timmons*, 520 U.S. at 373 (Stevens, J., dissenting).

²¹² See *N.J. Conservative Party, Inc. v. Farmer*, 735 A.2d 1189, 1193 (N.J. Sup. Ct. App. Div. 1999) ("A political party is an association of persons sponsoring ideas of government, or maintaining certain political principles or beliefs in public policies of government, and its *purpose is to urge adoption and execution of such principles in govern-*

right.²¹³ The right of a political party is the collective rights of voters who have gathered for the explicit reason to engage in political expression in a manner louder and more efficient than an individual voter can do on his own.²¹⁴ As a result of New Jersey's anti-fusion law, a minor party is unable to send a message to the voters about its desired standard bearer.²¹⁵ A party must be able to express its belief through its desired standard bearer, not a second choice representative.²¹⁶

New Jersey realizes the importance of expressing shared beliefs through a candidate on the ballot²¹⁷ and acknowledges that parties are interest groups that advance political ideas.²¹⁸ New Jersey recognizes the rights involved when a party and its members express their beliefs through the nomination process,²¹⁹ which is contrary to the approach that *Timmons* took in declaring that parties exist solely to elect candidates.²²⁰

mental affairs through officers of like beliefs." (emphasis added) (quoting *Rogers v. State Comm. of the Republican Party*, 282 A.2d 852, 855 (N.J. Super. Ct. Law Div. 1967)); see also *Lesniak v. Budzash*, 626 A.2d 1073, 1076 (N.J. 1993) ("The selection of nominees by political parties plays a crucial role in the electoral system. Indeed, the nomination of candidates by the major parties has been called the 'most critical stage' of the electoral process." (quoting *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1151 (1975))).

²¹³ *Timmons*, 520 U.S. at 373 (Stevens, J., dissenting) (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).

²¹⁴ See *Berger*, *supra* note 8, at 1412.

²¹⁵ See Brief for Respondent, *supra* note 16, at *25 ("[T]he fusion ban interferes with the message sent to voters by the party, in the voting booth, that it has nominated a particular candidate, and it does so despite the fact that the State otherwise uses its ballot system for precisely this purpose.").

²¹⁶ See *Timmons*, 520 U.S. at 371 (Stevens, J., dissenting) ("The fact that [a party] may nominate its second choice surely does not diminish the significance of a restriction that denies it the right to have the name of its first choice appear on the ballot.").

²¹⁷ See *Smith v. Penta*, 405 A.2d 350, 356 (N.J. 1979).

²¹⁸ See, e.g., *id.*; *Friedland v. State*, 374 A.2d 60, 65 (N.J. Super. Ct. Law Div. 1977) (quoting *Nader v. Schaffer*, 417 F. Supp. 837, 845 (D. Conn. 1976)). Minor parties introduce new issues into the political debate dominated by the major parties. See *Berger*, *supra* note 8, at 1385–86. This forces the major parties to broaden their own base and reach out to voters outside the party and to listen to and incorporate those voters' issues and concerns. In turn, the minor party members increase accountability among officials elected through a fusion ticket. See *id.* at 1386. Fusion gives voters the ability to determine which policies they prefer in a much more nuanced manner, enabling a candidate to know which policy has more public support. See *Kirschner*, *supra* note 14, at 702 (citing *Swamp v. Kennedy*, 950 F.2d 383, 389 (7th Cir. 1991) (Ripple, J., dissenting from denial of rehearing en banc)).

²¹⁹ See *Lesniak v. Budzash*, 626 A.2d 1073, 1080 (N.J. 1993).

²²⁰ *Timmons*, 520 U.S. at 363.

Parties are more than just vehicles or an avenue by which a candidate can win election. Parties serve a public interest by expressing ideals and philosophies. This expression is inherent in the nature of the party itself. The main way that parties express their views is by nominating a candidate. Parties that advance particular views further strengthen the marketplace of ideas, which is the backbone of a robust democracy. Thus, the right of a minor party to “disseminate its message cannot be minimized.”²²¹ While a party’s platform expresses a party’s entire views, very few people would read or have knowledge of the specifics of a platform. A significantly larger number, however, would be able to associate a candidate with a political party.²²²

The State’s counterargument is that a ban on fusion does not restrict a party’s expressive rights because the party can still endorse a candidate, even if the candidate does not appear on the minor party’s line on the ballot.²²³ Additionally, a campaign provides an outlet to express political beliefs and ideas, and a party does not need a ballot to express itself and its views.²²⁴ New Jersey’s anti-fusion statute only reduces the pool of potential candidates a party can nominate by a few people, making the prohibition a minimal, if not unnoticeable, infringement upon minor parties’ expressive rights.²²⁵ In this manner, a restriction on expression exists, but the party still has the ability to express its views to the public by nominating another candidate.

This narrow view, however, defeats the main point of parties selecting nominees. The right to endorse does not equate to the right to nominate a candidate. Newspaper editorial boards, unions, and organizations endorse candidates; political parties are the only associations who can nominate.²²⁶ An endorsement is not nearly as powerful of a tool of expression as having a candidate appear on the ballot.

Not being able to nominate the candidate of choice stifles the party’s message because minor parties generally only have limited resources and will not be able to reach as wide of an audience as they could if the general public read the minor parties’ name next to a

²²¹ Council of Alt. Political Parties v. State, 781 A.2d 1041, 1048 (N.J. Super. Ct. App. Div. 2001).

²²² See Tashjian v. Republican Party, 479 U.S. 208, 220 (1986) (“[T]he identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.”).

²²³ See *Timmons*, 520 U.S. at 361, 363.

²²⁴ See *id.* at 361, 363.

²²⁵ See *id.* at 363.

²²⁶ See *id.* at 373 (Stevens, J., dissenting) (“The right to be on the election ballot is precisely what separates a political party from any other interest group.”).

major party candidate's name on the ballot.²²⁷ Nominating a candidate informs the public more effectively than a simple endorsement because every voter will see the ballot, but not every voter will learn of an endorsement.

The costs for a minor party to endorse a major party candidate—to achieve a level of expression as effective as a nomination on the ballot—are an impermissible condition on the exercise of expressive rights. In New Jersey, even a nominal fee may amount to an impermissible condition on the exercise of expressive rights.²²⁸ In 2001, the New Jersey Appellate Division ordered the State to provide voter information for free to minor parties, just as it did for the two major parties, despite the nominal cost for minor parties to reproduce the voter lists, because imposing a fee unjustly burdened the rights of the minor parties.²²⁹

Paying to effectively disseminate and advertise an endorsement in New Jersey is prohibitive and certainly not nominal, especially in light of the substantially cheaper cost of obtaining a place on the ballot and given the immensely expensive nature of political advertising in the state.²³⁰ The cost of placing a candidate on the ballot is limited to whatever funds are necessary to gather the requisite signatures to qualify as a candidate—the State then bears the cost of printing and mailing a sample ballot to every registered voter.

3. The Right to Vote and the Right of Voter Choice

New Jersey's ban on fusion voting eliminates any voter choice as to the party line on which the voter should cast a ballot for the candidate.²³¹ This is the purpose of the anti-fusion law—prohibiting a candidate from securing the nomination of multiple parties inevitably prevents a voter from choosing the party and candidate combination of his choice. In determining the constitutionality of the anti-

²²⁷ See *id.*

²²⁸ See *Council of Alt. Political Parties v. State*, 781 A.2d 1041, 1051 (N.J. Super. Ct. App. Div. 2001) (citing *Green Party v. Hartz Mt. Indus.*, 752 A.2d 315, 332 (N.J. 2000)).

²²⁹ *Id.*

²³⁰ See Paul Steinhauser, *Game on in New Jersey*, CNN POLITICALTICKER (June 3, 2009, 9:46 AM), <http://politicalticker.blogs.cnn.com/2009/06/03/game-on-in-new-jersey>; see also *Hot Race in New Jersey*, WASH. POST, June 14, 1988, at A22 (noting that New Jersey had the second most expensive United States Senate campaign in the country).

²³¹ See *Smith v. Penta*, 405 A.2d 350, 359 (N.J. 1979) (Pashman, J., dissenting) (arguing that New Jersey's closed primary system "violates the imperative of voter freedom" because it prevents a voter from choosing to vote in a party's primary without first being a member of that party).

fusion statute, the question pursuant to the New Jersey Constitution is whether a voter has the right of choice to vote for any qualified candidate on any political party line on which the candidate wishes to run.

The right to vote in New Jersey “has taken its place among [the state’s] great values.”²³² New Jersey courts have a long history of interpreting the right to vote to include the right of choice.²³³

If the Legislature attempts to restrict the choice of a candidate who is qualified to hold the office by any party or group of voters, “it may at least be doubted whether it has not infringed a constitutional right of voters to have a free and untrammelled expression of their choice.”²³⁴

The right to vote and the right of voter choice, however, are not necessarily equal.²³⁵

The voter choice right has not been litigated yet as a basis for third-party access, but post-*Samson* it can serve as a solid legal foundation for minor parties.²³⁶ In *N.J. Democratic Party v. Samson*, the New

²³² *Gangemi v. Rosengard*, 207 A.2d 665, 667 (N.J. 1965).

²³³ *See, e.g., id.* (“[T]he right to vote would be empty indeed if it did not include the right of choice for whom to vote.”); *Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells*, 7 A.3d 720, 754 (N.J. 2010) (Rivera-Soto, J., dissenting) (referring to the “[New Jersey Supreme] Court’s longstanding fidelity to the principles that serve to safeguard the right of the people to choose by whom they shall be governed”); *Smith v. Penta*, 405 A.2d 350, 359 (N.J. 1979) (Pashman, J., dissenting) (“Without the option to choose, the vote itself is devoid of practical significance.”); *Alston v. Mays*, 378 A.2d 72, 76 (N.J. Super. App. Div. 1977) (“It is not the right to vote which is the underpinning of our democratic process; rather, it is the right of choice for whom to vote.”); *see also* *N.J. Democratic Party v. Samson*, 814 A.2d 1028, 1034 (N.J. 2002) (“The right of choice as integral to the franchise itself . . . is grounded in the core values of the democratic system”); *Matthews v. Atlantic City*, 417 A.2d 1011, 1016 (N.J. 1980) (“In general, an individual’s freedom of choice in exercising his franchise is a fundamentally important interest.”); *Quaremba v. Allan*, 334 A.2d 321, 326 (N.J. 1975); *Sadloch v. Allan*, 135 A.2d 173, 176 (N.J. 1957); *Imbrie v. Marsh*, 68 A.2d 761, 764 (N.J. Super. Ct. App. Div. 1949), *aff’d*, 71 A.2d 352 (N.J. 1950); *In re City Clerk of Paterson*, 88 A. 694, 695–96 (N.J. Sup. Ct. 1913); *State v. Black*, 24 A. 489, 493 (N.J. Sup. Ct. 1892), *aff’d sub nom.*, *Ransom v. Black*, 51 A. 1109 (N.J. 1893).

²³⁴ *Gansz v. Johnson*, 75 A.2d 831, 832 (N.J. Super. Ct. Law Div. 1950) (quoting *In re City Clerk of Paterson*, 88 A. 694, 696 (N.J. Sup. Ct. 1913)).

²³⁵ *See* *Gangemi v. Rosengard*, 207 A.2d 665, 667 (N.J. 1965).

²³⁶ Voter choice as a right was recently addressed in another context by the dissent in *Committee to Recall Robert Menendez from Office*. Relying on *Samson*, the dissent referred to the New Jersey Supreme Court’s recognition of “the rights of the people to have a choice about who shall govern them.” *Comm. to Recall Robert Menendez*, 7 A.3d at 777 (Rivera-Soto, J., dissenting) (citing *Samson*, 814 A.2d at 1033). The majority, however, did not address the voter choice part of the dissent’s argument on the merits; rather the New Jersey Supreme Court dismissed it as immaterial, reasoning that when the Federal Constitution preempts a New Jersey law, then the court is not in a

Jersey Supreme Court endorsed a very robust right for a voter to have a choice on the ballot when it ruled that the State must allow the Democratic Party to put forth a substitute candidate to replace then-Senator Robert Torricelli in the general election.²³⁷

The right of voter choice generally arises in New Jersey from either legislatively imposed qualifications for office that prevent a candidate from running, thereby limiting the number of qualified candidates and infringing upon a voter's choice in selecting a candidate,²³⁸ or a failure to adequately substitute a candidate, which deprives a voter of choice at the ballot.²³⁹ On the other hand, the New Jersey Supreme Court has held that the Legislature can limit a voter's choice by enacting a closed primary system²⁴⁰ and by preventing a candidate who has lost a bid for the primary nomination of a major party from running as a petition candidate in the general election, through so-called "sore-loser statutes."²⁴¹

position to apply broader constitutional rights under the New Jersey Constitution. *Id.* at 749 (majority opinion).

²³⁷ See *Samson*, 814 A.2d at 1036 (quoting *Catania v. Haberle*, 588 A.2d 374, 376 (N.J. 1991)); see also Paul Mulshine, Op-Ed, *Independents on the Ballot: New Jersey's the Third World for Third Parties*, STAR-LEDGER, Nov. 1, 2009, at 16 (predicting that certain restrictive third party ballot access laws are susceptible to challenges under the voter choice theory proffered in *Samson*).

Voter choice, in light of *Samson*, has also been viewed as a method of statutory construction and categorized as part of "The Democracy Canon." See generally Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 106–10 (2009) (discussing *Samson* and the Democracy Canon). The statutory construction view, however, only looks at one branch of the right to voter choice—substituting a replacement candidate onto the ballot, evidenced by *Samson* and its predecessors. It does not account for the second branch, which is more rights-oriented and focuses on overly burdensome candidate-qualification regulations that inhibit the number of candidates running, thereby reducing voter choice. See *infra* note 238 and accompanying text.

²³⁸ See, e.g., *Matthews v. Atlantic City*, 417 A.2d 1011, 1020 (N.J. 1980) (noting that strict candidate qualification requirements limited the number of candidates and thus indirectly reduced voter choice); *Gangemi*, 207 A.2d 665, 669 (holding that a two-year registration requirement to be eligible for office was unconstitutional because, as an overly restrictive qualification, it reduced the number of eligible candidates and burdened the voters' choice).

²³⁹ See, e.g., *Samson*, 814 A.2d at 1042 (holding that replacing the Democratic candidate for Senate with another candidate was necessary to "to ensure an opportunity for voters to exercise their right of choice" in the general election); *Catania v. Haberle*, 588 A.2d 374, 376 (N.J. 1990); *Fulbrook v. Reynolds*, 698 A.2d 565, 567–68 (N.J. Super. Ct. Law Div. 1997).

²⁴⁰ See *Smith v. Penta*, 405 A.2d 350, 356–57 (N.J. 1979).

²⁴¹ See *Sadloch v. Allan*, 135 A.2d 173, 179 (N.J. 1957).

Prohibiting fusion voting does not infringe on a voter's right to freely choose a candidate.²⁴² The voter still has the choice to vote for his desired candidate, which is what the jurisprudence in the area protects. New Jersey has not yet established a voter's right of choice to vote for his desired candidate on a specific party line. In fact, by upholding a closed primary, the State has shown that the Legislature can restrict a voter's choice as for which party he may vote.

Furthermore, the anti-fusion law does not eliminate voter choice by decreasing the number of eligible candidates on the ballot. The ban only prevents certain candidates from appearing on multiple lines of the ballot as the nominee of multiple parties, thereby solely limiting "the universe of potential candidates who may appear on the ballot" as a nominee of a certain party.²⁴³ The ban does not keep a candidate off the ballot in the first place, nor does it limit the number of eligible qualified candidates.

C. State Interests that New Jersey's Ban on Fusion Voting Furthers

The State's interests in prohibiting fusion will be weighed against the constitutionally protected rights of freedom of expression and association, pursuant to Article I, paragraphs 6 and 18 of the New Jersey Constitution. The New Jersey Supreme Court will afford these rights considerable weight, and the State interests in infringing upon the rights must be significant.

The State will argue that it has the freedom to reasonably regulate its own election laws and that prohibiting fusion voting protects valid interests, which outweigh any perceived constitutional burdens. The New Jersey Legislature has authority to enact reasonable regulation of *conduct* of primary and general elections.²⁴⁴ Conduct of elections includes registration of party membership²⁴⁵ and qualifications for signers of primary nomination petitions.²⁴⁶

The legitimate interests that the State has in banning the cross-nomination of candidates are—ensuring the integrity, fairness, and efficiency of ballots and of the election process; preventing voter con-

²⁴² According to the United States Supreme Court, a fusion law is not a restriction on voting because the law does not "restrict the ability of [a party] and its members to endorse, support, or vote for anyone they like." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). The law, however, does limit a party and its members from choosing its standard bearer. See discussion *supra* text accompanying note 174.

²⁴³ See *Timmons*, 520 U.S. at 363.

²⁴⁴ *Wene v. Meyner*, 98 A.2d 573, 576 (N.J. 1953).

²⁴⁵ *E.g., id.*

²⁴⁶ *E.g., Lesniak v. Budzash*, 626 A.2d 1073 (N.J. 1993).

fusion; preventing frivolous candidacies and overcrowded ballots; maintaining a stable political system through the prevention of party splintering and disruptions of the two-party system; ensuring that minor parties have sufficient support before granting them statutory party status; and identifying a clear electoral winner.²⁴⁷

1. Ensuring the Integrity, Fairness, and Efficiency of Ballots and the Electoral Process

New Jersey unquestionably has an interest in ensuring the integrity, fairness, and efficiency of ballots and the electoral process.²⁴⁸ The State may enact reasonable laws that prevent electoral distortions and ballot manipulations.²⁴⁹ The issue for the New Jersey Supreme Court to decide is whether prohibiting fusion voting furthers this interest.

The State has an interest in reasonably regulating the ballot under New Jersey's current system where candidates can undermine its integrity by abusing the candidate slogan provision and the relaxed ballot access.²⁵⁰ The State will contend that parties and candidates can "easily exploit fusion" by creating dummy parties that in turn endorse the candidate, with slogans such as the "No New Taxes" or "Stop Crime Now" party, which "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising."²⁵¹

Nevertheless, the State's legitimate interest in preventing the exploitation of the ballot is not sufficient to justify an infringement

²⁴⁷ Many of these primary reasons were litigated in *Timmons* and other fusion cases in circuit courts or extrapolated from State interests argued in prior New Jersey election and political cases.

²⁴⁸ See *In re Attorney Gen.'s "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups,"* 981 A.2d 64, 75 (N.J. 2009); *Smith v. Penta*, 405 A.2d 350, 356 (N.J. 1979); *Council of Alt. Political Parties v. State*, 781 A.2d 1041, 1052 (N.J. Super. Ct. App. Div. 2001); see also *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364–65 (1997); William E. Baroni, Jr., *Administrative Unfeasibility: The Torricelli Replacement Case and the Creation of a New Election Law Standard*, 27 SETON HALL LEGIS. J. 53, 59 (2002) (noting that when New Jersey courts balance the State's interest in regulating the election process against the right to vote, the ultimate question is to determine "when is the individual's right to vote trumped by the need to have orderly elections so as to protect the rights of other voters?").

²⁴⁹ For example, New Jersey's closed primary system is justified because it would create "false labels" that would "deceive" voters if a Republican was nominated as the Democratic candidate for office. See *Stevenson v. Gilfert*, 100 A.2d 490, 493 (N.J. 1953) (quoting *Roberts v. Cleveland*, 149 P.2d 120 (N.M. 1944)).

²⁵⁰ See N.J. STAT. ANN. § 19:13-4 (West 2010) (allowing a candidate to provide a three-word slogan following his name on the ballot); *id.* § 19:13-5.

²⁵¹ See *Timmons*, 520 U.S. at 365.

upon constitutional rights because the State can prevent such exploitation without banning fusion voting.²⁵² If New Jersey is concerned about the creation of dummy parties to demonstrate false support for a major party candidate, then the Legislature can raise the number of petition signatures required for ballot access from the extremely generous current standard.²⁵³ Stringent requirements for ballot access and for the creation of parties would effectively prevent any far-fetched scenario where new parties spring up as puppets of the major parties.

Furthermore, the State will argue that the anti-fusion law ensures integrity by promoting candidate competition by reserving limited ballot space for opposing candidates.²⁵⁴ But competition would actually increase by making candidates compete for additional nominations from minor parties in a fusion voting system.

While New Jersey, undisputedly, has the authority to regulate its elections to ensure integrity and fairness, a regulation that prohibits fusion is unreasonable because integrity and fairness can be achieved through reasonable regulations without infringing upon the constitutional rights of free association and expression inherent in a fusion system.

2. Preventing Voter Confusion

New Jersey, in regulating the electoral process, has an interest in avoiding voter confusion.²⁵⁵ The State can enact reasonable regulations to prevent confusion among the electorate.²⁵⁶ But preventing voter confusion as a justification for prohibiting fusion is “meritless and severely underestimates the intelligence of the typical voter.”²⁵⁷ New Jersey has recognized the intelligence of voters and declared faith in their ability to meaningfully navigate a ballot to find their preferred candidate or party by remarking that “[t]hose voters who read and think, or care, in even the slightest way, about what to do

²⁵² See *infra* Part V.E (discussing ballot access laws in a proposed New Jersey fusion statute).

²⁵³ See Brief for Respondent, *supra* note 16, at *38; *Timmons*, 520 U.S. at 376 (1997) (Stevens, J., dissenting).

²⁵⁴ See Brief for Petitioners, *supra* note 173, at *44.

²⁵⁵ *Council of Alt. Political Parties v. State*, 781 A.2d 1041, 1052–53 (N.J. Super. Ct. App. Div. 2001); see also *Timmons*, 520 U.S. at 364 (citing *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 199–200 (8th Cir. 1996)).

²⁵⁶ See *Wene v. Meyner*, 98 A.2d 573, 576–77 (N.J. 1953).

²⁵⁷ *Timmons*, 520 U.S. at 375–76 (Stevens, J., dissenting).

with their vote—other than throw it away—will be able to find their candidates” on the ballot.²⁵⁸

Preventing voter confusion rests on a faulty premise that a voter will be better informed and less confused if presented with less information and fewer choices.²⁵⁹ Fusion voting can actually enhance a voter’s knowledge about the candidates, parties, and issues²⁶⁰ by indicating to a voter details about the candidate through the parties that nominate him;²⁶¹ giving greater indication as to the policies each party supports, through the political alliances and coalitions formed across parties;²⁶² and by forcing parties and candidates to clarify their positions on narrow issues pushed by the minor parties. In addition, a major party and its candidate send a message rejecting a specific set of ideals by declining a cross-nomination with a minor party.²⁶³

Moreover, minor parties in New Jersey are not eligible to receive a ballot line in the first two columns,²⁶⁴ which will lessen voter confusion. A voter will know that the major party candidates will be in the first two columns, and if the voter does not want to (or know how to) vote for a fusion ticket, that voter does not need to look past the first two columns to cast a ballot.

New Jersey can take affirmative steps to prevent any minimal voter confusion that would arise out of a fusion system with clear ballot instructions printed at the polls and on the sample ballots sent out to registered voters before an election.²⁶⁵ Thus, the State interest in preventing voter confusion does not outweigh an infringement upon the constitutional rights of minor parties, voters, and candidates.

²⁵⁸ See *N.J. Conservative Party v. Farmer*, 753 A.2d 192, 196 (N.J. Sup. Ct. Ch. Div. 1999).

²⁵⁹ See *Fusion Candidacies*, *supra* note 25, at 1322.

²⁶⁰ See Brief for Republican National Committee, *supra* note 176, at *12–13; see also Richard A. Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 OR. L. REV. 1061, 1096 (2008) (predicting that fusion voting would increase voter knowledge, even if only minimally).

²⁶¹ See *Tashjian v. Republican Party*, 479 U.S. 208, 220 (1986) (“To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.”).

²⁶² See *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 199–200 (8th Cir. 1996).

²⁶³ See Brief for Republican National Committee, *supra* note 176, at *12–13.

²⁶⁴ N.J. STAT. ANN. § 19:14-12 (West 2010).

²⁶⁵ See, e.g., *N.J. Democratic Party v. Samson*, 814 A.2d 1028, 1033 (N.J. 2002) (ordering the Attorney General to send out letters to any voter who had received a sample or absentee ballot in order to prevent voter confusion regarding the candidate substitution on the ballot).

3. Preventing Frivolous Candidacies and Overcrowded Ballots

The State will also argue that it must prevent fusion voting because cross-nominations will lead to an increase in frivolous candidacies.²⁶⁶ Cross-nominations, however, will lead to fewer total candidates since minor parties will have the option of nominating a major party candidate who is already running, in lieu of nominating their own candidate.²⁶⁷ Fusion voting will strongly encourage minor parties not to nominate frivolous candidates but instead to try to forge a relationship with a major party candidate, given the benefits to third parties if they can successfully help elect a major party candidate.²⁶⁸

New Jersey has a history of frivolous candidates running in statewide and district elections. In statewide elections, New Jersey's low signature requirement strongly encourages minor party and independent candidates to run for office.²⁶⁹ In the 2009 gubernatorial election, twelve candidates, including ten petition candidates, ran for governor, spanning two rows on a ballot; yet only one petition candidate had enough support to qualify for the debates.²⁷⁰ The State has not taken any action to reduce the number of petition candidates on the ballot.

If the State desires to reduce the number of frivolous candidates, it should enact fusion voting, which will encourage minor party candidates to cross-nominate major party candidates, rather than sup-

²⁶⁶ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364–65 (1997).

²⁶⁷ New Jersey voters want there to be fewer candidates on the ballot. See SUFFOLK UNIV., NEW JERSEY STATEWIDE POLL (OCT. 26, 2009) (two-thirds of voters polled stated they would have preferred fewer candidates on the 2009 gubernatorial ballot), *available at* <http://www.suffolk.edu/images/content/fina.edit.NewJersey.Statewide.Tables.Oct.25.2009.pdf>.

²⁶⁸ For example, in New York, the Working Families Party routinely cross-nominates progressive Democrats rather than running their own candidates. Bosman, *supra* note 37, at A28. The Liberal Party and Conservative Party have not fielded serious individual candidates for statewide office in over fifty years, with the lone exception coming when the Conservative Party nominated James Buckley for the United States Senate who beat the Goldwater Republican, Charles Goodell. Brief of the Conservative Party of New York and Liberal Party of New York, *supra* note 26, at *6–7, *21.

²⁶⁹ Even though the signature requirement difference between major and minor parties is only two-hundred signatures, the State creates an incentive for minor party and independent candidates to run with the lower threshold. See *supra* note 152 and accompanying text.

²⁷⁰ Chris Megerian, *The Uninvited: Nine Who Would Be the Next Governor These Candidates Watch from Fringe as Daggett Joins Debate*, STAR-LEDGER, Oct. 19, 2009, at 3. In 1997, New Jersey had eight independent candidates for governor. *Council of Alt. Political Parties v. Hooks*, 179 F.3d 64, 77 (3d Cir. 1999).

port their own frivolous candidacy. The State can avoid frivolous candidacies and an overcrowded ballot more easily with stricter ballot access laws rather than through the prohibition of a voting mechanism that will not increase the total number of candidates.

4. Maintaining a Stable Political System Through the Prevention of Party Splintering and Disruptions of the Two-Party System

Preserving the two-party system was the “true basis” for the Supreme Court’s rationale in upholding the anti-fusion statute in *Timmons*.²⁷¹ The Court declared that a state has an interest in preventing party splintering and disruptions of the two-party system.²⁷² The Court also noted that the two-party system is a legitimate interest as long as it is not protected at the “complete[] insulat[ion]” of minor parties.²⁷³ New Jersey has also recognized that the Legislature may determine that the two-party system promotes political stability.²⁷⁴

The New Jersey Appellate Division, however, expressly rejected the U.S. Supreme Court’s view in *Timmons* that “alternative parties [are] synonymous with party splintering and excessive factionalism which lead to political destabilization.”²⁷⁵ Instead, the panel noted that minor parties can be “an integral part of the political process.”²⁷⁶

No evidence indicates that fusion voting undermines the two-party system. The Republican National Committee, a key stakeholder in the two-party system, did not view fusion as a threat to the stability of the system and filed an amicus brief on behalf of the New Party in *Timmons*,²⁷⁷ even though the New Party endorsed a rival Democratic

²⁷¹ *Timmons*, 520 U.S. at 377 (Stevens, J., dissenting).

²⁷² *Id.* at 364 (citing *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 199–200 (8th Cir. 1996)).

²⁷³ *Id.* at 366–67.

²⁷⁴ See *N.J. Democratic Party v. Samson*, 814 A.2d 1028, 1034–35 (N.J. 2002) (acknowledging that the “general intent of the elections laws [is, in part,] to preserve the two-party system.” (quoting *Kilmurray v. Gilfert*, 91 A.2d 865, 867 (N.J. 1952))). *Samson*, however, discussed preserving the two-party system in order to prevent voters from enduring a one-party system and losing their right of voter choice. The New Jersey Supreme Court established that, at a minimum, there must be two parties to reflect adequate choice for the voters; the court did not imply that there should be a maximum of two parties in the system. The court even acknowledged the important role third parties play in a “robust democracy.” See *id.* at 1041.

²⁷⁵ *Council of Alt. Political Parties v. State*, 781 A.2d 1041, 1048 (N.J. Super. Ct. App. Div. 2001) (citing *Timmons*, 520 U.S. at 367).

²⁷⁶ See *id.*

²⁷⁷ See generally Brief for Republican National Committee, *supra* note 176. Filing this brief was not in the self-interest of the Republican National Committee. The

Farmer-Labor candidate.²⁷⁸ Historically, fusion voting has not destabilized the two-party system.²⁷⁹ The New York political system has not crumbled with an active fusion voting system.²⁸⁰ As a result of fusion, a “modified two-party system” develops in which minor parties can play a significant role without achieving major party status.²⁸¹

Fusion voting arguably strengthens the two-party system.²⁸² If minor parties want to be taken seriously and have their views heard, then they will nominate one of the major party candidates. When minor parties have the ability to potentially serve a deciding role by pushing a candidate over the top to win an election, the parties will take advantage of that opportunity. Therefore, minor parties will often nominate major party candidates rather than fielding their own candidate.²⁸³ The more often that minor parties nominate a major party candidate, the fewer minor party candidates there are and the less chance there is for a third party candidate to surge to victory and undermine the two major parties.

Internal party differences that give rise to splintering are in no way prevented by an anti-fusion ban that prevents minor parties from

RNC is a fifty-percent stakeholder in the current two-party system and ascendancy of third parties would weaken the party’s base of support. It is hard to imagine that the Republican Party would ever advocate for the collapse of the two-party system or for policies that would severely undermine its stability. Yet the Republican Party filed a brief in support of minor parties’ associational rights to participate in fusion voting.

²⁷⁸ But see *Council of Alt. Political Parties*, 781 A.2d at 1044. In *Council of Alternative Political Parties*, the Democratic and Republican State Committees both intervened as defendants in a suit against a coalition of minor parties that demanded that New Jersey’s registration form contain an option for a voter to register with a minor party. *Id.*; Robert Schwanberg, *Third Parties Sue to get Ballot-Law Break*, STAR-LEDGER, Feb. 2, 1999, at 15.

²⁷⁹ See discussion *supra* Part II.B.

²⁸⁰ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 375 n.3 (1997) (Stevens, J., dissenting) (“[T]he parade of horrors that the majority appears to believe might visit Minnesota should fusion candidacies be allowed is fantastical, given the evidence from New York’s experience with fusion.” (citing Brief of the Conservative Party of New York and Liberal Party of New York, *supra* note 26, at *20–25)). See generally Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (1997).

²⁸¹ Berger, *supra* note 8, at 1406 (quoting DANIEL A. MAZMANIAN, *THIRD PARTIES IN PRESIDENTIAL ELECTIONS* 115 (1974)).

²⁸² See *Timmons*, 520 U.S. at 382, n.11 (Stevens, J., dissenting) (“Rather than jeopardizing the integrity of the election system, consensual multiple party nomination may invigorate it by fostering more competition, participation, and representation in American politics.” (quoting *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 199 (8th Cir. 1996))).

²⁸³ See discussion *supra* notes 267–68 and accompanying text.

working with other parties.²⁸⁴ By definition, fusion voting encompasses an outside minor party's decision to cross-nominate a major party candidate. Fusion does not depend on a major party making any decisions that could give rise to splintering.

If New Jersey wants to maintain the two-party system (which is within its prerogative even though certain laws seem to undermine that desire²⁸⁵), it can do so without infringing upon the freedoms of association and political expression of voters and minor parties.²⁸⁶ In weighing the balances, the rights of association and political expression outweigh the State's limited interest in protecting the two-party system.

5. Ensuring that Minor Parties Have Sufficient Support Before Granting Them Statutory Party Status

New Jersey has a valid interest in ensuring that any party that achieves major-party status does so through "bona fide and actual[]" support[]" and not by developing off of the popularity of a major party's candidate.²⁸⁷ Fusion voting could undercut the state's political party classifications²⁸⁸ and let minor parties ride the popularity of a

²⁸⁴ In its Amicus Brief, the Republican National Committee argued that party splintering is prevented if the major party has to approve and sign off on any minor party nomination of one of its candidates. Brief for Republican National Committee, *supra* note 176, at *9–11; *see also Twin Cities Area New Party*, 73 F.3d at 199. For a discussion of the merits of this idea in a fusion system, see *infra* Part.V.1.

²⁸⁵ Currently, the New Jersey Legislature does not wholeheartedly protect the two-party system in other areas of the election laws. The State gives minor parties benefits that could theoretically undermine the two-party system, such as requiring a major party to hold a primary while allowing a minor party to access the ballot through petition and providing a discrepancy in the signatory requirement in state elections. *See supra* notes 152, 154 and accompanying text.

²⁸⁶ Winner-take-all districts and no proportional voting, for example, help solidify two-party support. *See* Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 2056–57 (2003). Raising the signature requirements for petition candidacies would also strengthen the two-party system. *See* discussion *infra* Part V.E.

²⁸⁷ *See Timmons*, 520 U.S. at 366 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); *Storer v. Brown*, 415 U.S. 724, 733, 746 (1974)). The *Timmons* Court's logic rests on the arguably faulty premise that support for a major party candidate, through a minor party's nomination, is not bona fide or actual support for that party. A minor party is not trying to improve itself at the expense of or riding the coattails of the status of a major party's candidate—rather the minor party is trying to associate with that candidate and hold him out as one of the party's own. *Id.* at 376 n.5 (Stevens, J., dissenting).

²⁸⁸ *See* N.J. STAT. ANN. § 19:1-1 (West 2010). *See supra* text accompanying notes 62–65 for a discussion of New Jersey's requirements to classify as a statutory political party and what it entails.

major party candidate to gain statutory “political party” status without legitimate support.²⁸⁹

The State will argue that if fusion votes count towards the requisite party support to classify as a political party, then it will distort the minor party’s actual level of support. Voters may choose to vote for a candidate on a minor party line for the sole purpose of sending a message or boycotting the two major parties, but without any intent of supporting the minor party’s platform or views. Additionally, a voter may simply vote for a fusion candidate on the first party line he sees, regardless of which party it is.²⁹⁰ In practice though, a voter who just wants to support a candidate regardless of the party line will likely vote under the major party line, not the minor party line, thereby reducing the chance of the minor party garnering false support.

Becoming a statutory party allows that party to hold a primary and guarantees it a ballot line.²⁹¹ Given the immense benefits involved with achieving political party status, New Jersey uses a high threshold for third parties to obtain the status. The 10% support requirement to becoming an official party is stricter than the requirement in a large majority of other states.²⁹² The law requires 10% statewide, not just in a given district.²⁹³ In light of the high threshold, nothing indicates that reinstating fusion voting would assure minor parties a guaranteed 10% of the vote across the state in order to achieve political party status.

The 10% support requirement to qualify as a statutory political party is a reasonable regulation by the Legislature.²⁹⁴ While New Jersey has an interest in only granting statutory status to parties with bo-

²⁸⁹ See *Timmons*, 520 U.S. at 366. This view may also be representative of New Jersey’s two major parties’ line of thinking. In explaining why the Democratic State Committee intervened as a defendant in a suit brought by minor parties seeking the ability to register voters as members of a minor party, the State Democratic Chairman remarked that, “[a] party should earn its way into the electoral system, not have it handed to them.” Schwanberg, *supra* note 278, at 15 (discussing Council of Alt. Political Parties v. State, 781 A.2d 1041 (N.J. Super. Ct. App. Div. 2001)).

²⁹⁰ This issue though is not a significant problem considering the two major parties must occupy the first two lines on the ballot in New Jersey. See N.J. STAT. ANN. § 19:14-12 (West 2010).

²⁹¹ See discussion *supra* Part II.C.1.

²⁹² See Schwanberg, *supra* note 278, at 15. In the twentieth century, New Jersey was the only state that did not have a minor party qualify for a ballot line. Mulshine, *supra* note 237, at 16 (“The nearest parallel to our [ballot access] laws is perhaps in Russia, where Vladimir Putin makes his opponents in Moscow show support in Siberia if they wish to oppose him.”).

²⁹³ § 19:1-1; see also Council of Alt. Political Parties v. State, 781 A.2d 1041 (N.J. Super. Ct. App. Div. 2001); Mulshine, *supra* note 237, at 16.

²⁹⁴ See *Council of Alt. Political Parties*, 781 A.2d. at 1045.

na fide support, the State can ensure party support is genuine in a more narrowly tailored manner, such as raising the statutory threshold or not counting fusion votes in determining party status, without unconstitutionally burdening the rights of voters and parties.²⁹⁵

6. Identifying the Election Winner

The State needs to be able to clearly identify the election winner.²⁹⁶ This should not be an issue because counting votes would not fundamentally change under a fusion system—a fusion candidate’s total support is simply aggregated across all the party lines. If a candidate receives two votes on two party lines, the vote would still only count once.²⁹⁷

D. New Jersey’s Ban on Fusion Voting Violates the State Constitution

The New Jersey anti-fusion law is unconstitutional because of the undue burden it places on the associational rights of candidates and minor parties and the expressional rights of voters and minor parties. The State’s interests in upholding the ban—ensuring ballot integrity and bona fide party support prior to granting political party status—are not sufficient to justify the infringement upon the freedoms of expression and association that voters and minor parties are forced to endure.

Ensuring ballot integrity is a clear goal for the State. No evidence indicates, however, that the electoral process will be unfair, inefficient, or lack integrity in a fusion system. Prior state experiences, and New York’s current experience, suggest that fusion does not undermine electoral stability. The history of anti-fusion laws demonstrates that the bans were enacted not to protect the integrity of elections, but rather for the major party in power to quell any opposition from minor parties.²⁹⁸ The guise of protecting the electoral process is not a compelling interest that outweighs the infringement of the fundamental political rights of association and expression.

Furthermore, a ban on fusion voting is a broad and unreasonable response to New Jersey’s interest in ensuring that parties receive

²⁹⁵ See *infra* Part V.C (discussing a proposed fusion statute and the merits of these restrictions).

²⁹⁶ See *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 199–200 (8th Cir. 1996).

²⁹⁷ Counting two votes would violate the constitutional principle of “one person, one vote.” *Reynolds v. Sims*, 377 U.S. 533 (1964). For a discussion of which party should receive the vote tally in a fusion system, see *infra* Part V.D.

²⁹⁸ See discussion *supra* Part II.B.

bona fide support before assuming statutory party status. The State, if it so desires, can easily regulate a fusion voting system in such a way as to prevent minor parties from reaching statutory party status based on spurious support. For example, New Jersey can refuse to count votes for cross-nominated candidates toward the statutory political party requirements or the Legislature can raise the current level of support necessary to achieve party status.²⁹⁹ Therefore, the significant associational and expressive rights of individuals and parties outweigh the State's interest in ensuring that political parties achieve bona fide support, which New Jersey can achieve with other less obtrusive regulations.

V. PROPOSED FUSION STATUTE

Once the New Jersey Supreme Court finds the state's fusion ban unconstitutional, then the Legislature should enact reasonable regulations that ensure the associational and expressional rights of voters and parties, as well as protect the State's interests in conducting orderly elections.³⁰⁰ The Legislature should do this with an affirmative grant providing for fusion voting as opposed to impliedly accepting fusion through the absence of laws prohibiting it.³⁰¹ An affirmative grant prevents any ambiguity in the election statute regarding the use of fusion³⁰² and explicitly protects the right of fusion voting.³⁰³ A proposed statute to ensure fusion voting while protecting various State interests should read as follows:

²⁹⁹ See discussion *infra* Part V.C.

³⁰⁰ State regulation of a fusion system will necessarily infringe slightly on parties as other election regulations do, however, the proposed statute will not unconstitutionally limit rights as the anti-fusion law currently does.

³⁰¹ For example, Connecticut explicitly grants a right for fusion voting. CONN. GEN. STAT. § 9-453t (2010) ("Nothing in this section shall be construed to prohibit any candidate from appearing on the ballot as the nominee of two or more major or minor parties for the same office.").

³⁰² Some states technically allow fusion voting in unusual circumstances. California, Massachusetts, and New Hampshire "nominally permit fusion if a candidate wins election via write-in votes in a primary for a party of which the candidate is not a member, but that possibility is so remote as to be irrelevant for practical purposes." MORSE & GASS, *supra* note 15, at 3.

³⁰³ See, e.g., *S.C. Green Party v. S.C. State Election Comm'n*, 647 F. Supp. 2d 602 (D.S.C. 2009) (finding that South Carolina does not necessarily promote fusion as a policy because there is no statute providing for the scheme, only cases and an attorney general's opinion), *aff'd*, 612 F.3d 752 (4th Cir. 2010). "The court recognizes that the *practice* of fusion candidacies is accepted in South Carolina. The court will not, however, interpret those sources to mean that South Carolina has a *policy* of promoting fusion." *Id.* at 617.

A candidate for the general election may accept the nomination of more than one party and appear on the ballot on multiple party lines, provided that:

- (A) The nominating party and the candidate consent to the cross-nomination;
- (B) The candidate has not previously lost another party's nomination;
- (C) Votes for a party that engages in cross-nomination pursuant to this section, count towards the 10% voter-support threshold to achieve "political party status," as defined by section 19:1-1, only if the party achieves the requisite 10% of the vote in two out of the three preceding elections;
- (D) A voter, who selects the name of a candidate on the ballot on multiple party lines, shall have his vote count only once towards that candidate's total votes, but no party shall receive credit for said vote.

No other provision in this section shall be construed as prohibiting a candidate from appearing on the ballot as a nominee of more than one party.

A. *The Nominating Party and the Candidate Consent to the Cross-Nomination*

If either the candidate or the nominating party objects to the cross-nomination, then the State should not recognize or allow the fusion ticket to proceed. New Jersey may consider requiring that the major party itself give its consent before the cross-nomination is allowed.³⁰⁴ The concern behind major party consent is that a losing faction within its own party might break off and nominate the major party candidate on a newly created minor party solely to re-raise the issues discussed and decided in the primary election.³⁰⁵

B. *Sore-Loser Provision*

The New Jersey Supreme Court has already upheld the statute preventing a candidate who sought a primary nomination from later seeking a petition nomination.³⁰⁶ This law also had the effect of prohibiting fusion.³⁰⁷ If fusion is allowed, some version of the sore-loser

³⁰⁴ See Brief for Republican National Committee, *supra* note 176, at *3, *9–11.

³⁰⁵ *Id.*; Kirschner, *supra* note 14, at 718 (Involuntary fusion "subjects the internal decisions of political parties to the potentially destructive designs of forces external to these parties."). This concern can be remedied with the revised sore-loser provision. See *infra* Part V.B.

³⁰⁶ See *Sadloch v. Allan*, 135 A.2d 173, 178–79 (N.J. 1957).

³⁰⁷ See discussion *supra* note 74 and accompanying text.

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statute should remain. A situation in which a major party candidate loses its primary nomination and then subsequently forms another party to receive that nomination essentially replays the primary contest during the general election.³⁰⁸ The purpose of fusion voting is to allow minor parties to associate with major party candidates and to give their members an opportunity to express their political views while simultaneously voting for a candidate with a chance of winning the office. Fusion is not a mechanism to give a candidate who lost his party's primary nomination a backdoor way of obtaining ballot access.

New Jersey can implement a statute that prevents a candidate who has *already* lost a nomination from seeking ballot access through an alternate route.³⁰⁹ This will prevent intra-party battles from being rehashed. A candidate cannot lose a primary contest, and then raise those same issues again in the general election under the banner of a minor party.

C. Statutory Political Party

Requiring the support of 10% of the electorate for two out of the previous three elections rather than solely the last election (as the State currently requires³¹⁰) will force a minor party to demonstrate continued support across multiple elections in order to achieve “political party” status. This provision will allow New Jersey to keep its already high 10% threshold, while simultaneously advancing the State interest in preventing a minor party from riding the support of one candidate to statutory political party status.³¹¹

³⁰⁸ See Brief for Republican National Committee, *supra* note 176, at *3, *9–11.

³⁰⁹ Preventing a candidate who lost from seeking another nomination is true to the purpose of a “sore-loser” statute. New Jersey should not adopt a harsh sore-loser statute, like South Carolina’s, which the state keeps in place for cross-nominations on a fusion ticket—preventing a candidate who wins two minor party nominations, but later loses the major party primary election, from being eligible to appear on the ballot as a nominee of either party. See *S.C. Green Party v. S.C. State Election Comm’n*, 647 F. Supp. 2d 602, 614–16 (D.S.C. 2009), *aff’d* 612 F.3d 752 (4th Cir. 2010); 1970 S.C. Op. Atty. Gen. No. 2933; S.C. CODE ANN. § 7-11-10 (2009).

³¹⁰ N.J. STAT. ANN. § 19:1-1 (West 2010).

³¹¹ Not counting fusion tickets for party support, as an alternate means of achieving this goal, will also affect the major parties that have candidates running on fusion tickets because the major parties must demonstrate voter-support every election as well.

D. Multiple Votes by One Voter

New Jersey has voting machines that do not allow for a double vote.³¹² Thus, this provision is only relevant for New Jersey's mail-in ballots.

States that allow fusion voting have provisions that dictate what happens when a voter votes for the same candidate on more than one party line, thereby creating a "double vote," in order to ensure that a vote is properly counted and recorded. New York used to count a double vote in the tally for the candidate, but not the party;³¹³ however, beginning in 2010, New York updated its voting machines and began to count the vote for the party that appears first on the ballot.³¹⁴ Connecticut counts the vote for the minor party, believing that if a person checked a minor party box in addition to the major party line, that voter intended to support the minor party in some way.³¹⁵ New Jersey should follow the old New York mechanism, which had served the state well in its fusion system, of counting the vote in the candidate's tally but not counting the vote in any party's total vote count.

E. Additional Considerations

The Legislature should also raise the current signature requirements to access the ballot. New Jersey already has very generous ballot access laws, even granting minor parties a relaxed standard in statewide races.³¹⁶ The signature requirement should not become restrictive, but a candidate should have to demonstrate a modicum of support. Collecting one hundred signatures to petition onto the ballot as a candidate for the State Legislature³¹⁷ does not necessarily establish support for either the candidate or the party seeking to cross-nominate him.

³¹² § 19:5A-3(f).

³¹³ BENJAMIN HEALEY & MYRIAH PAHL, FUSION VOTING: AN ANALYSIS 4 (Demos 2007), available at http://archive.demos.org/pubs/fusion_web.pdf.

³¹⁴ N.Y. ELEC. LAW. § 9-112(4) (McKinney 2010). There is an exception for a gubernatorial race, which follows the old rule of a double vote only counting for a candidate and not a party. *Id.* The Conservative Party and the Working Families Party sought to enjoin the enforcement of the new counting method as a violation of the First and Fourteenth Amendments, but the court dismissed stating that it was too close to the election to enter a preliminary injunction and thus did not reach the merits of the issue. *Conservative Party of N.Y. v. N.Y. State Bd. of Elections*, No. 10 Civ. 6923, 2010 U.S. Dist. LEXIS 114155, at *3, *6–8 (Oct. 15, 2010).

³¹⁵ HEALEY & PAHL, *supra* note 313, at 4.

³¹⁶ See *supra* notes 152, 154 and accompanying text.

³¹⁷ § 19:13-5; N.J. DEP'T OF STATE—DIV. OF ELECTIONS, INDEPENDENT CANDIDATE REQUIREMENTS, available at http://www.state.nj.us/state/elections/candidate_pdf/independent-candidate-requirements-110410.pdf (last visited March, 15, 2011).

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Raising the requisite number of signatures to access the ballot once fusion voting is allowed accomplishes two objectives for the State. First, it will reduce the number of parties on the ballot. New Jersey already has numerous parties on a ballot in a given race. Presumably, fusion voting would entice other third parties to form and seek ballot access, thus increasing that total. Second, moderately stricter ballot access laws will reduce the chance of dummy parties forming just to support a major candidate.³¹⁸ The concern that minor parties would form solely to support a major party candidate does not sufficiently justify restricting the minor parties' constitutional rights;³¹⁹ however, it does warrant legislative action to prevent parties from forming for the sole purpose of cross-nominating a candidate.

VI. CONCLUSION

New Jersey's anti-fusion law betrays fundamental rights guaranteed by the New Jersey Constitution, upon which the New Jersey Supreme Court has historically relied to protect robust free speech and assembly rights even if directly contrary to federal interpretation pursuant to the First Amendment. The fusion ban preserves the two-party system without furthering sufficient State interests to justify the infringement of a candidate's and minor party's associational rights and the expressive rights of voters and minor parties.

The anti-fusion law unconstitutionally restricts the associational rights of minor parties and candidates by preventing a party from nominating its desired standard bearer. The fusion ban violates New Jersey's broad constitutional right of free speech by prohibiting a voter from expressing a clear message to candidates and elected officials and by preventing a minor party from expressing to the public which candidate best represents the party's deep-rooted beliefs and principles.

At a contentious time in New Jersey politics—when strong partisan rhetoric drowns out voter concerns—fusion voting can provide voters with real choice and a powerful voice. New Jersey voters need the ability to express their disenchantment with the current state of politics and send a message to public officials, candidates, and the political parties. As the *Star-Ledger* noted in its endorsement of an independent candidate for governor, “the value of a vote is not limited to picking a winner. The real value lies in the signal it sends about what

³¹⁸ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997); see also discussion *supra* text accompanying notes 250–253.

³¹⁹ See discussion *supra* Part IV.C.1.

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the voter believes is best for the city, county or state—not merely at the moment, but long-term.”³²⁰

³²⁰ Editorial, *supra* note 1, at 22.